Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

October Term, 1996

MICHAEL MARTIN AND CYNTHIA MARTIN,

Petitioners,

v.

MARK HORTON, et al., jointly and severally,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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131 pp

QUESTION PRESENTED

Whether foster care workers employed by a private corporation under contract with the State of Michigan to provide services under state law to parents and children and foster care to children alleged in a Probate Court proceeding to have been abused, are absolutely immune from a suit for damages under 42 U.S.C. § 1983 with respect to all their activities.

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

The Petitioners Michael Martin and Cynthia Martin respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan in this case.

OPINIONS BELOW

The substantive opinion from which the Petitioners petition for a writ of *certiorari* is reported at 215 Mich. App. 88, 429 Mich. 852; 412 N.W.2d 205 (1996). (App. 1) The Michigan Supreme Court denied Petitioners' application for leave to appeal on April 1, 1997 (App. 44); and a timely motion for reconsideration on June 30, 1997. (App. 46) On April 21, 1992 the Circuit Court dismissed both the 1988 and 1989 second amended complaints. (App. 47).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 inasmuch as the Petitioners' claim for damages rested in part upon violation of a Federal Constitutional right. The Court of Appeals denied a federal right in holding that the allegations against private social workers acting under color of state law for violation of the substantive Fourteenth Amendment due process right to have and raise a family, do not allege a cause of action under 42 U.S.C. § 1983.

The Court of Appeals relied exclusively upon federal law of immunity applicable to suits brought pursuant to 42 U.S.C. § 1983 to determine that privately employed social workers enjoyed an absolute and complete judicial immunity from a state court lawsuit for damages. Thus a significant federal policy has been affected by a state court adjudication. See Hart and Wechsler's *The Federal Courts and the Federal System*, Fourth Edition, 548-551 and *Flournoy v. Wiener*, 321 U.S. 253 (1944); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *St. Louis, I.M. & S. Ry. v. Taylor*, 210 U.S. 281, 293 (1908); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478

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STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

The Petitioners Michael Martin and Cynthia Martin brought their child Ashley to the Hospital on or about December 14, 1984 when she was 13 weeks old. An examination revealed multiple fractures that the Martins could not explain. The child was not returned to the Martins but instead was placed in foster care and a Probate Court child abuse proceeding was initiated by the Michigan Department of Social Services (DSS)[1] on December 18, 1984.

The DSS has the authority to petition the Probate Court in child protective matters and to supervise foster care under Michigan Law. The DSS contracted with the Respondent

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[1] Hereafter designated as the (DSS), although the agency is now known as the Family Independence Agency (F.I.A.)

Children's Aid Society (hereinafter "CAS"), a private enterprise, to provide the social services, supervision of foster care, and preparation of reports, that the DSS was obligated to provide to Ashley and her parents. The CAS was not involved in initiating child abuse or neglect proceedings and the events which are the subject of the suit below occurred after the adjudication trial.

At the adjudication jury trial on January 13, 1986, the Martins testified that they had not caused Ashley's injuries and offered expert evidence that the child had suffered from bone disease. Nevertheless, by a preponderance of the evidence, the jury found that abuse had occurred. Thereafter the Probate Court took jurisdiction over the child with authority to impose a variety of dispositional consequences. Ashley remained in foster care separated from her parents, under the direction and supervision of the Respondents from December 19, 1984 until May 18, 1988.

During this time, despite the availability of mounting medical evidence of the Martins' innocence, the Respondents repeatedly threatened the Petitioners with the termination of their parental rights unless they confessed to having abused their child.

After several review hearings, and appeals delayed and complicated by the judicial process itself, on September 15, 1987 the Supreme Court of Michigan ordered the Court of Appeals of Michigan to hear the Martins appeal from the finding of abuse and the continuing foster care placement. 429 Mich. 852; 412 N.W.2d 205 (1997). On April 5, 1988, the Court of Appeals ordered that Ashley be returned to the Martins relying on substantial evidence that bone disease caused Ashley's injuries and two psychological reports strongly urging the return of the child to its parents. *Matter of Martin*, 167 Mich. App. 715, 423 N.W.2d 327 (1988). Ashley remained in foster care and under the direction and supervision of CAS, from December 19, 1984 until May 18, 1988, 43 months. (App. ¶ 20) during which time the Petitioners saw their child for an hour or two approximately once a week.

Thereafter, the Petitioners brought suit in the Circuit Court of Michigan against the DSS, certain employees of the DSS, the CAS Respondents and certain of its employees alleging violation of state law and federal Constitutional Law. (the 1988 complaint) (App. 51).

A second suit was instituted in 1989, which alleged essentially the same facts but named other DSS employees and other CAS employees. (the 1989 complaint) (App. 60). Both cases were consolidated for all subsequent proceedings by order of the Circuit Court entered on March 14, 1991.[2]

Each complaint was amended twice. The Second Amended Complaint (1988) alleged *inter alia*:

> Both by statute and pursuant to contract with the DSS, the CAS is obligated to direct its activities toward the reintegration of a child into his/her family and the resolution of those problems which necessitated the original placement. (App. ¶¶ 22, 53)

After alleging the statutory duties which the Respondents CAS, STOVAL and CLAYTON owed Plaintiffs (App. ¶¶ 23, 53), Petitioners alleged that the Respondents breached their duties in the following ways:

> (a) Attempted to discourage and destroy the relationship between Plaintiff and Ashley by curtailing visitation, allowing only supervised visitation in foreign environments, and permitting Ashley's foster parents to move approximately 300 miles away despite the obvious strain that such move would cause on the relationship between Ashley and Plaintiffs;

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[2] As the Respondents' Brief in the Court of Appeals states in its description of the 1988 and 1989 cases: "However, for most purposes, the reader can treat the facts as a unified whole without being concerned with what happened in a particular case, because it all came down to the same issues of fact and law at the motions which are the subject of this Cross-Appeal. [for absolute immunity of the CAS]".

(b) Failed to develop a working relationship with Plaintiffs which addressed their steadfast position that they were innocent of the charges against them. Instead, Defendants created an antagonistic and adversarial situation by **insisting that Plaintiffs confess to having abused Ashley as a precondition for Ashley's return;** (emphasis supplied)

(c) Acted to foster the relationship between Ashley and her foster parents while threatening Plaintiffs with permanent termination of their Parental rights; . . .

(e) Discouraged and curtailed visitation between Plaintiffs and Ashley by curtailing the frequency of visitation, eliminating home visits, and allowing visitation only under strained conditions and in foreign settings;

(f) . . . . Defendants covertly and surreptitiously attempted to gather information supportive of their anticipated recommendation that Plaintiffs' parental rights be terminated and, further, participated in a conspiracy with Defendant SCHORNSTEIN intended to provide and produce information of their recommendation that Plaintiffs' parental rights be terminated;

(g) Failed to refer Ashley to appropriate physicians for an evaluation, to consider the scholarly/medical opinions which confirmed Plaintiffs' claim that Ashley's injuries were a result of an underlying physical condition rather than child abuse, and failed to consider psychological evaluations of Plaintiffs which opined that they had not abused Ashley and that there was no risk in returning Ashley to their custody. (App. 54).

The Second Amended Complaint (1989) avers similar allegations against the other CAS Respondents, namely ZAK and TRAVIS-EWING (App. ¶¶ 42, 70). Significantly, the Petitioners alleged:

> 50. Plaintiffs MARTIN's right to the custody of Ashley Martin is a liberty interest guaranteed by the Michigan Constitution, Const 1963, Art 1, § 17, and by the Fifth and Fourteenth Amendments to the Constitution of the United States.
>
> 51. Defendants GREEN, SWIEHART, FENISON and HART, individually, by their actions set forth in paragraph 47, above, and in conspiracy with the CAS, the CAS Defendants, and with Herman Schornstein, M.D., Joseph Fischoff, M.D. and Sharon Antczak, violated Plaintiffs' Constitutional rights and under color of law deprived Plaintiffs of their right to the custody of Ashley as follows:
>
> (a) Allowed Ashley's foster parents to move with Ashley 150 miles away from Detroit although such move further strained Plaintiffs' relationship with Ashley, caused emotional distress to Ashley and occurred without notice to Plaintiffs and without a proper hearing
>
> (b) Decreased Plaintiffs' visitation rights with Ashley without a proper hearing and based upon a one-sided, negligent evaluation that was infirm as a result of the biased history presented to Defendant ANTCZAK;
>
> Failed to establish goal-orientated activities for Plaintiffs to achieve and failed to identify the specific actions which Plaintiffs were required to take, aside from admitting responsibility for Ashley's injuries, which would result in Ashley's return to Plaintiffs. Defendants' steadfast insistence that Plaintiffs admit responsibility

for Ashley's injuries as the only activity which would result in the reunification of the family established an adversarial relation between Plaintiffs and Defendants which led Defendant to convey to the Court an irrebuttable presumption that Plaintiffs were unfit parents;. . . .

(f) Failed to present any evidence at the dispositional hearings that indicated that Plaintiffs would be abusive to Ashley but still insisted that Plaintiffs should not regain custody of Ashley;

(g) Relied on, obtained and used as a basis for their plans and goals the opinions of outside consultants, such as Defendant ANTCZAK, that were formulated without adequate history and based on biased information.

52. Defendants' actions set forth in paragraphs 47 and 51 above, deprived Plaintiffs of their constitutional rights and entitle Plaintiffs to recover their attorney fees and actual and/or punitive/treble damages under 42 USC 1983." (App. ¶¶ 49, 50, 51, 52, 75)

On February 22, 1991, the Circuit Court considered the question of immunity and ruled that absolute judicial immunity was not available as to any of the Defendants, that all Defendants had a qualified immunity, and that qualified immunity could be defeated only by a showing of bad faith.[3]

As late as January 10, 1992 the Circuit Court denied the motion for summary disposition of the claims against the CAS

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[3] Judge Stephens opined that there were questions of fact with respect to the bad faith of Respondents Zak, Travis-Ewing, Stoval, Clayton and Schornstein and the CAS. (App. Respondents' Brief in the Court of Appeals, page 11). Nevertheless the Court of Appeals, applying absolute immunity to Schornstein notwithstanding the allegation that Schornstein had falsified his recommendation to the CAS worker Clayton. 215 Mich. App. 107.

Respondents finding no factual support for even a qualified immunity. Ultimately, on April 21, 1992, the Circuit Court on its own motion, dismissed the complaints and granted summary disposition of both complaints pursuant to MCR 2.116(c)(8) and (10) for failure to state a claim and no genuine issue of material fact. Judge Stephens, stated: "The plaintiff argues that the department control with C.A.S. made C.A.S. the department for the purposes of duties. If this were true, absent gross negligence, C.A.S. would be cloaked in governmental immunity." (App. 47). She viewed the Plaintiffs case as merely alleging a professional standards, ordinary negligence or contract matter.

Judge Stephens acknowledged:

> Something was terribly wrong in the process by which the courts monitored and controlled the custody of young Ms. Martin. Evidence has been presented to this court which would support findings that various persons charged with evaluating and supervising the Martins were willfully false or careless in certain of their reports. The record supports and the Court of Appeals found that the court itself acted in a way that was an abuse of discretion." (App. 47)[4]

The Petitioners appealed from the dismissal of the complaints and the Respondents cross-appealed from the denial by the Circuit Court of their defense of an absolute immunity.

The judges of the Michigan Court of Appeals addressed only the issue of official immunity as it applied to the state

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[4] The Petitioners appealed from the orders of dismissal in both cases but did not pursue their claims against other Defendants who were employees of the state. In a prior appeal, the Court of Appeals had conferred absolute judicial immunity on Dr. Schornstein, a psychiatrist who evaluated Ashley on behalf of the Probate Court, and who reported to the DSS and the Court. The immunity extended to his investigations, reports, and testimony. Thus CAS and its employees Bennie Stoval, Celia Clayton (1989 complaint) and Andrea Zak and Kim Travis Ewing (1988 complaint) are the Respondents.

claims. *Martin v. Children's Aid Society*, 215 Mich. App. 88 (1996). Two Judges found that the CAS and its employees had an all-inclusive blanket absolute immunity from a suit for damages with respect to their activities undertaken pursuant to the contract with the DSS relying on federal judicial precedent for authority. Without explanation, the Court also found that the Petitioners did not "allege a cause of action under 42 U.S.C. § 1983" against the CAS Respondents. (App. 10). One judge dissented.

The Supreme Court of Michigan, without addressing the merits, denied Petitioners' application for leave to appeal with 2 of 7 Justices dissenting from the denial of review and denied a motion for reconsideration on June 30, 1997 with 3 Justices dissenting. (App. 45). Thus, in Michigan, private foster care workers acting under color of state law, can conduct all their varied activities, with intentional disregard for the law or with gross negligence and they are completely immune from suit.

REASONS FOR GRANTING THE PETITION

I. QUALIFIED OR ABSOLUTE IMMUNITY CONFLICT AMONGST THE COURTS.

There are conflicting views in the Circuit and state courts about the existence and scope of immunity with respect to protective service or foster care workers[5] involved in child abuse and neglect cases. In the following cases a blanket absolute immunity was found. *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989); *Vosburg v. Dep't of Social Services*, 884 F.2d 133 (4th Cir. 1989); *Coverdell v. Dep't of Social & Health Services*, 834 F.2d 758 (9th Cir. 1987); *Meyers v. Contra*

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[5] Characterizing these workers including the Respondents as "social workers" or even "professionals" is an unsupported characterization. There is no reason to believe that any of the employees of the CAS had any advanced degree, an undergraduate degree in social work, or any certification or license.

Costa Co. Dep't of Social Services, 812 F.2d 1154 (9th Cir. 1987); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984).

Most jurisdictions have found that protective service or foster care workers are absolutely immune from suit **for filing a petition** alleging child abuse or neglect under theories of quasi-prosecutorial immunity originally set forth in *Butz v. Economou*, 438 U.S. 478 (1978). These jurisdictions analogize the duties of the protective service worker to the functions performed by a prosecutor, although the child abuse and neglect actions in Probate Courts are considered civil in nature. *See, Meyers v. Contra Costa Co. Dep't of Social Servs.*, 812 F.2d 1154 (9th Cir.), cert. denied, 484 U.S. 829 (1987); *Coverdell v. Dep't of Social & Health Services*, 884 F.2d 133 (9th Cir.1989); *Mazor v. Shelton*, 637 F. Supp. 336 (N.D. Cal. 1986); *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989).

There is also a split of authority amongst the federal circuits, with respect to the investigation of suspected cases of neglect and in taking temporary custody of children. The Sixth Circuit has afforded absolute immunity on grounds of quasi-prosecutorial immunity, *Kurzawa v. Mueller*, 732 F.2d 1456 (1984), while the First, Second, Third, Fifth and Seventh Circuits have found the functions performed were essentially police functions rather than prosecutorial and have extended only qualified immunity. *See, Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992); *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988); *Landstrom v. Department of Children & Family Servs.*, 892 F.2d 670 (7th Cir. 1990).

The Ninth Circuit has extended the concept of quasi-prosecutorial immunity to encompass activities involved in gathering of information and in making recommendations in connection with the post-adjudication state of the dependency proceeding, including monitoring, child placement, and custody decisions. *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989). The court opined that these activities were quasi prosecutorial in nature because they "were taken in connection

with, and incident to, ongoing child dependency proceedings". *Id.* at 503. *See also, Kurzawa v. Mueller, supra.* In contrast, the 10th Circuit granted only qualified immunity to social workers investigating foster care homes and placements of children. *Snell v. Tunnell*, 920 F.2d 673, 689 (10th Cir. 1990).

State courts have also produced confusing and conflicting opinions regarding the question of social worker immunity under § 1983. In one case, the Oregon Supreme Court held that granting absolute immunity was improper for worker functions involving investigating, taking of the child into custody, and denying parents' visitation while the child was in a foster home. *Tennyson v. Children's Servs. Div.*, 775 P.2d 1365, 1370 (Or. 1989). *See also, Jaggers v. Zolliecoffer*, 718 S.W.3d 441 (Ark. 1986) (refusing to grant absolute immunity for a federal claim where state statute granted only qualified immunity); *Nation v. Colla*, 841 P.2d 1370 (Ariz. Ct. App. 1991) (granting absolute immunity for initiation and pursuit of child dependency proceedings but only qualified immunity for actions subsequent to the filing of the petition); *Babcock v. State*, 809 P.2d 143 (Wash. 1991) (affording only qualified immunity for negligent foster care investigation and placement). *But see, Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869 (Cal. Ct. App. 1990) (finding absolute immunity analogizing the social worker to the prosecutor).

Protective services and foster worker immunity in the context § 1983 suits is thus in a state of disarray.

II. THE IMPORTANCE OF LIMITING IMMUNITY OF FOSTER CARE WORKERS IN CIVIL RIGHTS ACTIONS.

It requires no citation of authority to draw this Court's attention to intense public concern about child abuse and neglect. Reports of child abuse and neglect are astronomical, proceedings flood state courts, and the criticisms of the way in which government handles the problem are abundant both from those who believe government is not intrusive enough in

the protection of children and those who believe government is too intrusive in family lives causing harm to children and families.

The fundamental Constitutional right to raise a family, the right of a child to be with his or her family, the policy behind 42 U.S.C. § 1983 are important national interests. They are placed at serious risk, if workers acting under color of state law can police families without concern for potential liability even for gross or intentional abuses of power.

III. THE COURT OF APPEALS DECISION TO APPLY ABSOLUTE IMMUNITY TO PETITIONERS' STATE AND FEDERAL CLAIMS AGAINST THE CAS RESPONDENTS IN RELIANCE UPON FEDERAL PRECEDENT WAS ERRONEOUS.[6]

A. The Court of Appeals determination that Petitioners had not alleged a 42 U.S.C. § 1983 claim was incorrect.

Ignoring the articulated grounds for dismissal of the complaints, the Court of Appeals considered a ground which the trial court had rejected, absolute judicial immunity. Although expressing doubt about immunity of social workers in a 42 U.S.C. § 1983 action, without elaboration, the Court states: "However, plaintiffs do not allege a cause of action against the CAS Respondents under that section." 215 Mich. App. 88, 95 fn 4. The Second Amended Complaints refer explicitly to § 1983 and deprivation of Constitutional and statutory rights. The Complaints were consolidated so that allegations in both complaints were applicable to all Respondents. The Court of Appeals acknowledged in fn 1 of the

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[6] The Court of Appeals speculated that the DSS defendants might also have absolute judicial immunity but states: "However, plaintiffs' claim against the DSS defendants rests, in part, upon 42 U.S.C. 1983, and it is not clear whether judicial immunity is afforded to social workers under that statute. *Martin* at 94 fn 1 and 4.

Martin opinion that the Petitioners did assert a 42 U.S.C. § 1983 action.

A suit brought under 42 U.S.C. § 1983 may sometimes be maintained against private individuals. The Supreme Court test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) which required that the conduct causing the deprivation in a section 1983 action be "fairly attributable to the State." "Fair attribution" requires deprivation to be caused by exercising a state-created privilege or right, "by a state-imposed rule of conduct, or by a person for whom the state is responsible. . . . " In addition, the court must find that "the party charged with the deprivation may be fairly described as a state actor." *Lugar*, at 928, 930 Therefore the clearest inference that can be drawn is that the Court of Appeals took the view that a 42 U.S.C. § 1983 action **could not be asserted** against the private Respondents because the Respondents were not government officials.

Since a § 1983 claim was clearly and explicitly contained in the Complaints, the only inference to be drawn from the Court of Appeals cryptic phrase is that it found that a § 1983 claim could not be asserted against a private enterprise and its employees even acting under color of state law. Since the Respondents' responsibility was to implement state law, there is no doubt they were subject to § 1983 for a civil rights violation.

B. The Court of Appeals misinterpreted § 1983 precedent in determining that absolute immunity should be applied to private foster care workers.

Finding that the Petitioners did not allege a cause of action under 42 U.S.C. § 1983, the Court of Appeals then relied on federal appellate court opinions in § 1983 cases to extend "absolute immunity to social workers initiating and monitoring child placement proceedings and placements in cases similar to the instant case." *Martin* at 95-96. The Court of Appeals found that the only recourse of a parent for wrongful private or governmental social work conduct was in

the Probate Court child abuse or neglect proceeding itself. *Id.* at 97. Absolute immunity was needed to prevent liability "for services performed in monitoring child placement and custody decisions pursuant to court orders."

There are no Michigan cases providing immunity of any sort for private social workers. *Id.* at 88. The Court of Appeals also held that the Michigan statute which confers immunity on **government officials** did not apply to the non-governmental CAS Respondents.[7] Therefore the precedents which the Court of Appeals used to confer absolute immunity on the CAS Respondents all involved 42 U.S.C. § 1983 cases. It relied on *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989); *Vosburg v. Dep't of Social Services*, 884 F.2d 133 (4th Cir. 1989); *Coverdell v. Dep't of Social & Health Services*, 834 F.2d 758 (9th Cir. 1987); *Meyers v. Contra Costa Co. Dep't of Social Services*, 812 F.2d 1154 (9th Cir. 1987); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984). The fact that CAS Respondents were not government officials made no difference and it was not addressed.

42 U.S.C. § 1983 provides a remedy for violations of federal constitutional and statutory rights and in doing so creates a unique species of tort liability. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial'." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1979)).

Although the language of § 1983 does not provide for any immunities, the Supreme Court has consistently held that certain individuals are immune from suit under this act. It has

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[7] Ironically, the Michigan statute confers only a qualified immunity to government officials. MCLA 691.1407(2) and (3). Only judges, legislators and the elective or highest appointive executive officials of all levels of government acting within the scope of their authority have absolute immunity. MCLA 691.1407(5); 3.996 (107) (5).

consistently taken the position that in enacting the original version of § 1983 in 1871 Congress did not intend to "abolish wholesale" all of the common law immunities which existed at that time. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309 (1989) ("[I]n enacting § 1983 Congress did not intend to override well-established immunities or defenses under the common law"); *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

In *Malley v. Briggs* the Court set forth the method to be utilized in deciding questions of immunity under § 1983. It stated:

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts . . . If 'an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel ***against*** recognizing the same immunity in § 1983 actions' . . . Thus, while we look to the common-law for guidance, ***we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form***.

Id. at 475 U.S. 335, 339-40 (1986) (quoting *Tower v. Glover*, 467 U.S. 914 (1984) (emphasis added).

In *Burns v. Reed*, 500 U.S. 478, 487 (1991); and *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-271 (1993) decided after *Kurzawa*, this Court took a sparing, functional approach to recognition of absolute immunity in 42 U.S.C. § 1983 cases.

1. The Court of Appeals did not undertake an historical analysis of immunity in § 1983 suits.

In addition, the Michigan Court clearly erred in awarding the private party Respondents absolute immunity, because it failed to perform the necessary historical inquiry into whether foster workers enjoyed absolute immunity for their official

duties in 1871. Had it performed this analysis it would have concluded that there was no tradition of immunity "firmly rooted in the common law" in 1871 because the profession as we know it today did not exist at that time. An examination of the history of child welfare indicates that prior to the latter part of the 19th century the care of dependant children was primarily delegated to county almshouses. Anthony M. Platt, *The Child Savers*, 108, 2nd ed. (1977). The first government organization devoted to the welfare of children, the Society for the Prevention of Cruelty to Children, whose purpose was "organized protection for dependant children" and "provision of an official character for the prosecution of parents or others who ill used and brutally treated [the] young and defenseless" was not founded until 1875 in New York. *Id.* at 108, citing Margaret K. Rosenbaum, *Perennial Problems in the Juvenile Court Justice for the Child.* Additionally, one of the first reported job descriptions which comes close to the functions of the contemporary social worker involved in the child abuse and neglect process was reported in the Annual Report of the Boston Children's Aid Society, but not until 1886.

> The plan of having an outdoor worker has been fully developed in the engagement of Mr. C. W. Birtwell. This is a new departure of the Society's work . . . Mr. Birtwell, in various ways, becomes acquainted with families in the poor and degraded parts of the city, *studies the character of the children, and the best way to help them – whether in their own homes or by entire removal from their surroundings.*

Henry W. Thurston, *The Dependant Child*, 179 (1930), quoting Twenty-second Annual Report, Boston Children's Aid Society, 1885-1886, 8-11.

Absolute immunity, which creates a total denial of any cause of action, was traditionally available only to judges acting within their jurisdiction, legislators acting within a traditional legislative capacity, and prosecutors acting as advocates in criminal proceedings. *See*, Sheldon H. Nahmod,

Civil Rights and Civil Liberties Litigation, § 7.01 (2d ed. 1986); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (seeking immunities in 1871 that were "well grounded in history and reason"); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (analyzing whether a common law counterpart in 1871 was accorded immunity); *Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1976) (prosecutorial immunity at common law); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (noting that immunity for judges was well established by 1871).

Although absolute immunity has been afforded to other individuals it has only been extended to governmental officials where the officials' functions are "so sensitive as to require a total shield from liability", *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and "it is demonstrated that absolute immunity is essential for the conduct of the public business". *Butz v. Economou*, 438 U.S. 478, 507 (1978). Furthermore, because of the severe impact of absolute immunity upon plaintiffs, the Court has indicated that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties". *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia J. concurring in part and dissenting in part); *Buckley v. Fitzsimmons, supra* at 2614 (ruling that qualified immunity should be the norm or usual scope of immunity for governmental officials).

Mr. Justice Thomas dissenting in a denial of cert. in *Hoffman v. Harris*, 114 S. Ct. 1631 (Thomas, J., dissenting) (1994) noted that the courts that have afforded workers absolute immunity "appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983". *Id.* at 1632.

2. The Court of Appeals failed to apply a functional analysis to the question of absolute or qualified immunity.

The Michigan Court of Appeals in the instant case, found that the state employees were entitled to qualified immunity, while it afforded ***absolute immunity*** to the private party defendants. In reaching its decision the court below relied primarily on policy considerations as evidenced by this statement:

> Professional assistance to the Probate Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children. Its ***advisors and agents*** cannot be subject to potential suits by persons, aggrieved by the Court's decision vindictively seeking revenge against the Court's assistant as surrogates for the jurist. Faced with such liability, the social worker would naturally tend to act cautiously and refrain from making difficult decisions, delay in intervening to protect the child, avoid confronting the aggressive parent with the necessity of changing his attitudes and seeking psychiatric help to do so. Such an atmosphere defeats the function of the continuing jurisdiction of the Probate Court in the abstract, and in reality poses the potential for death for an abused child who is not protected because the social worker exercised excessive caution in arriving at a judgment as to whether there is sufficient evidence of abuse to merit action on his or her part.
>
> Mere qualified immunity is not enough protection to prevent the chilling effect of a potential suit on the exercise of a social worker's professional judgment and discretion in operating as an ***arm of the Probate Court*** to protect abused children.

Martin v. Children's Aid Society, 215 Mich. App. at 97 (emphasis added).

The Court of Appeals appears to have applied a public policy approach combined with an assumption that non-governmental CAS Respondents were an integral part of the judicial process.[8]

A functional approach has sometimes been applied to immunity cases to decide which type of immunity, absolute or qualified – a public officer should receive. 117 S. Ct. 2106; *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496, 88 L.Ed.2d 507 (1985); *Burns v. Reed*, 500 U.S. 478, 487; 111 S. Ct. 1934; 114 L.Ed.2d 547 (1991); and *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-271 (1993); *Forrester v. White*, 484 U.S. 219, 224 (1988).

The language of the Court of Appeals in *Martin* refers to the workers as an "arm of the court" and that "professional assistance" to the court is critical to its ability to make informed decisions. It noted that its "advisors and agency" cannot be the subject of lawsuits. In so concluding, the court misinterprets the role of the CAS foster care workers, who in fact were private employees of a private entity under contract with the State to perform governmental functions and who were adversaries in the Probate Court proceedings against the parents.

Even as to judges, legislators, and prosecutors, an absolute immunity is narrowly limited. The court below erred by granting a "blanket" absolute immunity to the CAS defendants, and in failing to specifically address the issues raised pertaining to allegations of a conspiracy to obstruct justice

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[8] The Court of Appeals quoted *Kurzawa* as follows: "Caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision. . . . There is little sense in granting immunity up through adjudication . . . and then exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders." 215 Mich. App. 88, 96.

and commit perjury involving the CAS defendants and other parties. Although a witness is absolutely immune from § 1983 liability, *Briscoe v. LaHue*, 460 U.S. 325 (1983), absolute immunity is not applied to an extrajudicial conspiracy to give perjured testimony. *San Filippo v. United States Trust Co.*, 737 F.2d 246 (2d Cir. 1984), cert. denied 470 U.S. 1035 (1985). In this case the court held that *Briscoe's* rationale "to encourage witnesses to come forward with all they know does not justify extending that [absolute] immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255. Other jurisdictions have held similarly. *See, Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988) (Absolute witness immunity does not extend to individuals who procure others to give false testimony. "Defendants cannot hide behind the witness immunity to escape liability for subornation of perjury"); *La Boy v. Zuley*, 747 F. Supp. 1284, 1289 (N.D. Ill. 1990), accord *Stokes v. Chicago*, 744 F. Supp. 183 (N.D. Ill. 1990); *Foster v. Lake Jackson*, 813 F. Supp. 1262 (S.D. Tex. 1993) (Absolute witness immunity does not pertain to an official's intentional concealment of information in a civil suit.)

Judges when performing judicial functions have absolute immunity. *Stump v. Sparkman*, 435 U.S. 349 (1978); Legislators in their legislative functions, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). Certain government officials such as proseutors, *Butz v. Economou*, 438 U.S. 478, 508-512 (1978), and executive officers engaged in adjudicative functions, and the President. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

Legislative aids were absolutely immune only when performing acts legislative in nature and not when taking other acts even in their official capacity. 408 U.S. at 625. Cases involving judges, *Supreme Court of Virginia v. Consumers Union of United States*, 446 U.S. 719, 731-737 (1980); *Stump v. Sparkman*, 435 U.S. 349 (1978), and prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976) have followed a similar line.

But a governor and his aides only had a qualified immunity. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). High federal officials of executive branch had qualified immunity. *Butz v. Economou*, 438 U.S. 478 (1978). The policy consideration balanced rights of citizens and the need to protect officials who are required to exercise discretion and the encouragement of vigorous exercise of official authority. Members of the President's cabinet do not have absolute official immunity, nor do members of the White House staff. *Butz v. Economou, id.*

3. The policy analysis of the Court of Appeals was flawed.

There is no reason to assume private foster care workers not subject to absolute immunity will perform poorly. Arguments put forth in support of immunity for social workers address the potential impact which the lack of immunity will have on their behavior. They argue that the potential exposure to large damage awards for the consequences of their decisions will serve to chill the exercise of their professional judgment in determining how to respond most effectively to cases of suspected abuse". Timothy J. Courville, *Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 19 B.C. L. Rev. 949, 985 (1986). Others argue that such potential liability will cause social workers to avoid gaining knowledge of suspected child abuse or be so hesitant to take action against alleged perpetrators that they will become ineffective in preventing child abuse. *Kurzawa v. Mueller*, 732 F.2d at 1458; *Whelehan*, 558 F. Supp. at 1099. There is no reason to assume that the performance of foster care workers will be more incompetent if they are held accountable in a § 1983 suit.

The court below also found that absolute immunity was necessary because the court must rely on professional assistance in making "informed, life deciding judgments". Affording absolute immunity to foster care workers provides no assurance that the information and opinions presented to the

court will be competent and reliable. An inference to the contrary is more likely to be accurate.

The net result of the Court of Appeals decision must be an absolute immunity in all such cases involving nongovernmental foster care workers, while **government** employed workers would have a qualified immunity in Michigan.

There is no more reason to assume that private foster care workers will perform poorly if they lack absolute immunity, then all the public officials who have only qualified immunity in § 1983 actions and the private prison guards given no immunity at all in *Richardson v. McKnight,* 117 S. Ct. 2100 (1997). Affording immunities based on policy considerations premised solely on these arguments fails to consider the underlying intent of § 1983 – the enforcement of and the protection of the rights guaranteed by the Constitution. By closing the door to judicial redress, immunities increase the powerlessness and alienation of civil rights victims by denying a remedy even where there has been a violation, *Id.* at 97. It has been argued that assigning immunities to officials resulting in less accountability may actually encourage unconstitutional conduct. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 St. L. Rev. 51, 83 (1989) (hereinafter "A Critical Approach").

To relegate those whose civil rights have been violated to a proceeding in which the only issue is placement of a child provides no remedy for violation of federal Constitutional rights and undercuts the policy of § 1983. Another argument advanced in favor of granting immunity for social workers is that other avenues of redress are available to the plaintiff. Proponents of immunity argue that plaintiffs can "appeal or otherwise challenge the legality of the proceeding itself . . . seek custody orders in the state court which has jurisdiction over the child . . . seek agency review and perhaps bring state suite . . . [or] subject [the social worker] to professional discipline within the Social Services Department". *Mazor*, 637 F. Supp. at 336. This argument was also

adopted by the Michigan Appellate Court in the instant case which opined that the plaintiffs were not without judicial remedies. "The parent of the apprehended child is not left remediless – he or she may always attack the court's order directly or on appeal." *Martin* at 97.

This justification of the Court below is misguided because these avenues of redress present little relief to nearly all those persons who find themselves embroiled in the Probate Court process. Many parents and the children involved in the process are indigent and therefore must rely on court appointed counsel for protection of their rights in the Probate Court. Studies of the performance of court appointed counsel in child abuse and neglect proceedings have found that the legal representation afforded to these clients is of low quality due to the combination of poor individual performance on the part of the attorneys and systematic flaws. Robert F. Kelly and Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 Rutgers L. Rev. 1217, 1219 (1988).[9]

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[9] Factors which contribute to the low performance are market related, i.e. high case loads and low compensation control the attorney's performance. It is also suggested that appointing judges may implicitly avoid active lawyers because they will challenge the way the court usually handles these types of cases. *Attorney Performance* at 1221. Judges seldom take action to penalize incompetent performance. McKay, *Competence and the Professionally Responsible Lawyer*, 29 Emory L. J. 971, 973 n.5 (1980). A client faced with inadequate legal representation may not be able to effectively force an improvement in attorney performance because these clients may lack the knowledge necessary to assess the attorney's performance. Professional disciplinary proceedings are also ineffective because the disciplinary system tends to focus on serious intentional misconduct, rather than incompetence or negligence. *Attorney Performance* at 1221. Finally, the possibility of a malpractice action against the attorney is not a viable means of controlling attorney behavior because "Demonstrating that the lawyer fell below the standard practice of other members of the bar would be difficult, given the generally low level of performance that research suggests is characteristic in these cases. The

The argument justifying social worker immunity based on the availability of alternative venues for redress of constitutional violations has been criticized. "While such alternatives may at first glance appear to offer hope of redress, they are in reality, merely false promises that do little more than ease the conscience of a court which has, by imposing absolute immunity, closed the door to a fundamental right of due process. Eric P. Gifford, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 Tex. Tech. L. Rev. 1013, 1035 (1995). The record in the case below is compelling evidence of the actual lack of appropriate redress available to respondents in a child protection proceeding. Even with the assistance of competent, aggressive legal counsel, before the Petitioners' daughter was returned to them, they were required to obtain an order from the Michigan Supreme Court, commanding the appellate court's review of the probate court proceedings, a matter which took over two years to complete.

IV. PRIVATE FOSTER CARE WORKERS LACK ANY IMMUNITY IN LIGHT OF *RICHARDSON V. MCKNIGHT*

The scope and existence of any official immunity in 1983 suits against private enterprises performing government functions under contract with the state has been significantly clarified by *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), but the effect which *Richardson* might have had on the Michigan Supreme Court or Court of Appeals in this case as well as other federal and state courts is unclear. Both state and federal courts need guidance on the availability and scope of immunity of foster care workers.

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lawyer is typically only required to exercise the degree of care '[c]ommensurate with that generally afforded to clients by other lawyers in similar matters." *Id.* at 1221-22 citing Note, *Evaluating 'Competency' Criteria: Toward a Uniform Standard of Lawyer Performance*, 59 Wash. U. L. Q. 1919, 1940 (1981).

Richardson makes it clear that § 1983 admits of no immunities, citing *Wyatt v. Cole*, 504 U.S. 158 (1992) that immunity would be recognized only where "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." (quoting *Owen v. Independence*, 445 U.S. 622, 637, (1980)).[10]

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[10] Qualified immunity was afforded to private parties in the Fifth, Eighth, Tenth and Eleventh Circuits. *See, Folson Investment Co. v. Moore*, 861 F.2d 1032 (5th Cir. 1982) (granting qualified immunity to individual for wrongful attachment of real property pursuant to state attachment legislation, noting that the common law defense of probable cause to the torts of malicious prosecution and wrongful attachment was transformed by Congress into an immunity along with the passage of § 1983); *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988), vacated on other grounds, 489 U.S. 1002 (1989) (private individual granted qualified immunity for reliance on state's prejudgment attachment procedure); *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) (qualified immunity afforded to private party for invoking a state garnishment procedure subsequently declared unconstitutional); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), cert. denied, 498 U.S. 1074 (1991) (qualified immunity afforded where private individual was acting pursuant to contractual obligations).

Other jurisdictions, however, have refused to extend immunities to private parties. In *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910 (1978), the court refused to grant immunity to a guardian alleged to have conspired to "sterilize [the plaintiff] against her will, to delay her marriage to her present husband, and to remove her second child from her custody, all in violation of her constitutional rights". *Id.* at 3. The court held that "[t]o place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by [§ 1983]". *Id.* at 15. *See also, Howerton v. Gavica*, 708 F.2d 380 (9th Cir. 1983); *Conner v. Santa Ana*, 897 F.2d 1487 (9th Cir. 1990), cert. denied, 498 U.S. 816 (1990); *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (refusing to grant immunity but allowing a good faith defense to a private individual for reliance on a state statute).

Wyatt v. Cole, 504 U.S. 158 (1992) was the first decision rendered by this Court in a case involving the question of qualified immunity for private party defendants in § 1983 litigation. This Court held that qualified immunity is not available to private § 1983 defendants. Writing for a six to three majority, Justice O'Connor rejected the defendants' arguments that strong policy considerations justified the imposition of immunity, noting instead that the policy reasons for granting qualified immunity to public officials did not have a sufficient nexus to support extending qualified immunity to private individuals. Citing, *Butz v. Economou*, 438 U.S. 478 (1978), and *Wood v. Strickland*, 420 U.S. 308 (1975) this Court noted that private parties do not hold any public office which requires them to make discretionary decisions in furthering the public good. This Court reiterated that history counseled against extending qualified immunity to private parties.

Finding that there was no "firmly rooted tradition" of immunity at common law, the Court in *Richardson* inquired into the immunity doctrine's purposes and examined whether these purposes warranted immunity for privately employed prison guards. The petitioners claimed that they should be entitled to qualified immunity since they were performing the same functions as those generally performed by governmental agencies. However, the Court dismissed this argument and a functional argument on the question of whether any immunity existed. *Id.* at 2106.

After disposing of petitioners' functional argument, the Court examined the purposes of the immunity doctrine to determine if there were sufficient policy reasons to afford these protections to private parties. It concluded that the policy reasons for granting immunity to governmental officials was not applicable in the context of private firms.

The Court in *Richardson* first rejected the "most important special government immunity-producing concern – unwarranted timidity" because of market factors which ensure

accountability, and the availability of insurance which diminishes fear of liability. Distraction by a lawsuit was rejected as insufficient to justify immunity. *Id.* at 2106. The Court found that "unwarranted timidity" in its employees was a less relevant concern for private firms because the firm has "strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or 'non-arduous' employee job performance", *Id* at 2107, because it is subjected to competitive market pressures.

The Court rejected a second rationale for governmental immunity; to "ensure that talented candidates are 'not deterred by the threat of damages suits from entering public service' " *Id.*, quoting *Wyatt v. Cole* at 167. The Court noted that privatization appropriately addresses this immunity related need in that private companies generally carry insurance to protect themselves against potential negligent actions by its employees, private firms may and often do indemnify their employees, and because they are not constrained by civil service rules they are free to offset any risk to their employees through higher salaries or increased benefits. The Court rejected a third rationale for government immunity, the concern that lawsuits may "distract" an employee from their duties. *Id.* at 2107, citing *Harlow v. Fitzgerald*, 457 U.S. at 816.

The Court noted in *Richardson* that its opinion was limited to the context in which it arose stating: "That context is one in which a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.* at 2108.

Applying the Court's holding in *Richardson* to the facts in the instant case demonstrates that policy considerations weigh heavily against an absolute immunity for private foster care workers. A concern about "unwarranted timidity" on the part of the social workers is unwarranted because the Children's Aid Society is a private corporation that is subject to

competitive market pressures. This organization competes with other organizations for state contracts to provide services on behalf of the DSS to residents of the State of Michigan and as such has "strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or 'non-arduous' employee job performance". Furthermore, because it is a private corporation, similar to the prison management firm in *Richardson*, it has the flexibility to directly reward and penalize employee performance without the restrictions imposed by civil service rules. Like *Richardson*, any concern the Respondents might have about the threat of damage suits upon recruitment or morale is also mitigated by the availability of insurance and a fluid compensation structure.

As in *Richardson*, the State has reserved certain significant functions, such as reviewing the CAS reports and making the final determination to seek termination of parental rights. The Michigan Legislature did not provide immunity for these private foster care enterprises nor absolute immunity for government employed foster care workers. *Martin* at 109. Indeed, the holding in *Richardson* is directly applicable to the Respondents in the instant case because the CAS is "systematically organized to assume a major administrative task" (their involvement in the instant case lasted three years), "with limited direct supervision by the government" ("Their involvement with the case was only to review reports filed by the CAS personnel contracted to handle Ashley's placement". *Martin* at 94).

The Respondents were not closely supervised by DSS. The Court of Appeals stated that its opinion does not provide a "blanket absolute immunity to social workers . . . It is limited to the facts of this case, in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy." *Martin* at 96 fn 4. There is no record of the "close oversight" of which the court speaks. In fact, the opposite appears to be true. For example, the foster placement of Ashley was removed 150 miles from the home of the Martins without a court order. *Id.* at 103 fn 2.

An accurate picture of CAS function in relation to the DSS is described by Judge White dissenting in *Martin*. She noted the testimony of DSS employee Swihart who became involved in the Martin case as of April 1, 1986. The lack of control of the DSS over the case is revealed in his deposition testimony summarized by Judge White: "Swihart testified at deposition that the permanency plan when Ashley was first placed in the court's wardship was to reunite her with plaintiffs. However, in March 1987 the plan changed to file for permanent custody and a termination of plaintiffs' parental rights. Swihart testified that the reason for this change was that CAS defendant Celia B. Clayton felt that "the parents were not recognizing that there was abuse.' Swihart testified he agreed with Clayton's recommendation because he had 'to go on what she's doing in her work and what she sees and reports to me,' specifically Ashley's reaction after she was with her natural parents for a short period. Swihart never observed plaintiffs with Ashley. Swihart testified that he did not know why plaintiffs were not allowed to visit with Ashley outside the CAS' premises between April 1986 and October 1987 and that 'we let the contract agency run the case the way they feel-they're working directly with them.' " 215 Mich. App. 88, 102.

One can safely assume that the level of oversight provided by the DSS over Respondents or the involvement of the Probate Court of foster care workers in this case was not significantly different then in any abuse and neglect case. Inasmuch as there is no history of foster care workers at common law, and the function performed by the CAS Respondents could be performed by other private agencies, such as the Judson Center, or Catholic Social Services, and since insurance could be obtained, the mere distraction of a law suit is insufficient to justify any immunity.

Separation of a child from a family has been found to interfere with the [c]ontinuity of relationships, surroundings and environmental influences [which] are essential for a

child's normal development." Goldstein Freud, Solnit, *Beyond the Best Interests of the Child* 31-32 (2d ed. 1979). The absolute immunity found to exist by the Michigan Court of Appeals undermines accountability of foster care workers to comply with the law, and poses a serious threat to the best interests of our children.

CONCLUSION

The petition for a writ of certiorari should be granted.

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MARTIN v CHILDREN'S AID SOCIETY

Docket Nos. 140360, 152486, 152489. Court of Appeals of Michigan Submitted March 9, 1995, at Detroit. Decided January 12, 1996, at 9:40 A.M. Leave to appeal sought.

Michael and Cynthia Martin brought an action in the Wayne Circuit Court against the Children's Aid Society (CAS), Bennie Stoval, the director of the CAS, Celia B. Clayton, a CAS employee, and others, including the Department of Social Services, alleging that the defendants had caused them to be and to remain wrongfully separated from their daughter, who had been taken from them and placed in foster care for several years because of suspected child abuse. The Martins thereafter brought a separate action in the Wayne Circuit Court against Warren Swihart and Kathy Hart, DSS employees, Andrea Zak and Kim Travis-Ewing, CAS employees, and others, again alleging the same wrongful separation from their child. The actions were consolidated. The court, James J. Rashid, J., acting on behalf of Cynthia Diane Stephens, J., granted summary disposition for Swihart and Hart on the basis of qualified immunity. The plaintiffs appealed. The court, Cynthia Diane Stephens, J., although having denied summary disposition for the CAS and its employees on the basis of immunity, granted summary disposition for those defendants on the bases of the failure to state a claim and the absence of any genuine issue of material fact. The plaintiffs appealed with respect to defendants Zak and Travis-Ewing, and those defendants cross appealed. The plaintiffs appealed separately with respect to defendants CAS, Stoval, and Clayton, and those defendants also cross appealed. The appeals were consolidated.

The Court of Appeals *held*:

1. Swihart and Hart, as DSS employees, were protected from liability unless their conduct violated a clearly established statutory or constitutional right of the plaintiffs of which those defendants should have known. Although there is a constitutional right to family integrity, that right is not absolute and must be balanced against the state's interest in protecting a child's health and welfare. Because the involvement of Swihart and Hart was limited to the review of the reports filed by the CAS personnel and because there was no evidence that Swihart and Hart knew that the plaintiffs' constitutional or statutory right to reunification was being denied, the trial court correctly granted summary disposition for those defendants on the basis of qualified immunity.

2. Social workers are immune from liability with respect to activities involving the initiating and monitoring of child placement proceedings and placements in cases in which there is close oversight of the social workers' placement recommendations by the probate court. Because the claims of the plaintiffs related to activities of the CAS and its employees involving activities and recommendations concerning placement that were directed to and considered by the probate court, the trial court should have granted summary disposition for the CAS defendants on the basis of immunity.

3. Although the trial court incorrectly denied summary disposition for the CAS defendants on the basis of immunity, the trial court did reach the right result by granting summary disposition for them on other grounds.

Affirmed.

WHITE, P.J., concurring in part and dissenting in part, stated that the trial court properly granted summary disposition for the DSS defendants on the basis of qualified immunity, properly denied summary disposition for the CAS defendants on the basis of immunity, and erred in granting summary disposition for the CAS defendants except Bennie Stoval pursuant to MCR 2.116(C)(8) and (10). Social workers are not entitled to absolute immunity with respect to activities relating to child placement, and, because the activities alleged by the plaintiffs include activities that are not directly related to judicial proceedings, the CAS defendants are not entitled to quasi-judicial immunity. A claim of professional negligence was sufficiently a part of the case that the trial court erred in foreclosing pursuit of that claim on the bases that it was not pleaded and that amendment would be unduly prejudicial.

1. SOCIAL SERVICES – CASEWORKERS – IMMUNITY – CONSTITUTIONAL RIGHTS – FAMILY INTEGRITY.

Case workers with the Department of Social Services are immune from liability for activities undertaken in the course of the employment unless their conduct violates a clearly established statutory or constitutional right of the plaintiffs of which the defendants should have known; although there is a constitutional right to family integrity, that right is not absolute and must be balanced against the state's interest in protecting a child's health and welfare.

2. SOCIAL SERVICES – CASEWORKERS – IMMUNITY – CHILD PLACEMENT PROCEEDINGS.

Social workers are immune from liability with respect to activities involving the initiating and monitoring of child placement proceeding and placements in cases in which there is close oversight of the social workers' placement recommendations by the probate court.

Schreier & Weiss, P.C. (by *Jay B. Schreier*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Stewart H. Freeman* and *Margaret A. Nelson,* Assistant Attorneys General, for Warren Swihart and Kathy Hart.

Jenkins, Nystrom & Hitchcock (by *Reuben M. Waterman*), for the Children's Aid Society and its employees.

Before: WHITE, P.J., and BANDSTRA and W. P. CYNAR,* JJ.

Bandstra, J. In these consolidated cases, plaintiffs sued various defendants, including employees of the Department of Social Services (the DSS defendants) and the Children's Aid Society and four of its employees (the CAS defendants). The trial court granted defendants' motions for summary disposition and denied plaintiffs' motion for leave to amend their complaint. We affirm.

On December 18, 1984, plaintiffs brought their thirteen-week-old daughter, Ashley Lynn, to an emergency

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

pediatric clinic. Blood tests and X-rays revealed that Ashley was suffering from pneumonia, numerous broken ribs (possibly as many as eighteen) in various stages of healing, fractures of both femurs, a bruise on the lower back, and a bruise on the left leg. The doctor suspected abuse, and the DSS filed an emergency petition with the Wayne County Probate Court requesting that Ashley be temporarily detained. The order was issued. Thereafter, another petition was filed requesting that Ashley be made a temporary ward of the court. Plaintiffs denied that they had abused Ashley and requested a jury trial with respect to the allegations contained in the petition.

Trial originally was scheduled for August 1985, but was adjourned by mutual agreement of the parties. Plaintiffs wanted extra time to determine if brittle bone disease or some other medical problem might explain Ashley's injuries. In January 1986, a trial was held in which the jury found that the DSS had proven by a preponderance of the evidence that Ashley had been abused and that she should be made a temporary ward of the court. At trial, plaintiffs presented evidence that Ashley possibly suffered from a medical disorder (e.g., copper deficiency) that made her susceptible to bone fractures, and the DSS presented evidence that Ashley's injuries were the result of abuse.

The DSS had contracted with the CAS, a private organization, to provide services for neglected and abused children. When Ashley was removed from plaintiffs' care, the DSS transferred her to the CAS, which placed her in a foster home. After the jury trial in January 1986, additional hearings were held before the probate court pursuant to M.C.L. 712A.19; M.S.A. 27.3178(598.19)

and MCR 5.973. On February 24 and 25, 1986, a dispositional hearing was held to determine whether Ashley should be returned to plaintiffs. The DSS asserted that a potential for reabuse existed until plaintiffs admitted responsibility for Ashley's injuries. Plaintiffs continued to claim that they had never abused Ashley. After hearing the evidence presented by both sides, the probate court continued Ashley in foster care. At a review hearing held in August 1986, Ashley was again continued in foster care.

At a March 1987 review hearing, plaintiffs argued a motion for a new trial. Plaintiffs presented evidence from two physicians stating that Ashley's injuries were caused by a copper deficiency or some other metabolic disorder. The court denied the motion, stating that it did not believe that the documents from the physicians constituted newly discovered evidence. The court continued Ashley in foster care.

At an October 1987 statutory rehearing, two additional reports were submitted into evidence. The first report, from a pediatric psychology professor, recommended that Ashley be slowly returned to plaintiffs' care. The second report, from a pediatric therapist, stated that continued placement of Ashley in foster care could cause irreparable psychological and emotional damage to her. At the conclusion of the hearing, the court stated that it would not reconsider the issue of what caused Ashley's injuries because the issue had been resolved at the jury trial in January 1986. The court ordered Ashley's attorney to locate a neutral therapist to immediately implement an observational treatment situation between plaintiffs and Ashley. Ashley was continued in foster care.

Another hearing was held on January 13, 1988. A neutral therapist who would be agreeable to all parties had not yet been located. The foster care worker testified that Ashley had recently become more anxious and aggressive. Although the foster care worker did not recommend that Ashley be returned home, he did recommend that plaintiffs be allowed to assume greater responsibility for Ashley. The court continued Ashley in foster care.

While Ashley was in foster care, plaintiffs filed a claim of appeal in the Court of Appeals, asserting that the probate court lacked jurisdiction over the matter and that the probate court's continued placement of Ashley in foster care constituted an abuse of discretion. The Court of Appeals dismissed the claim of appeal. The Supreme Court remanded to this Court for plenary consideration, as on leave granted. *In re Martin*, 429 Mich. 852 (1987). On April 5, 1988, this Court affirmed the probate court's jurisdiction, but reversed the order continuing Ashley's placement in foster care and remanded for further proceedings. *In re Martin*, 167 Mich. App. 715, 733; 423 N.W.2d 327 (1988). As a result of these proceedings, Ashley was returned to plaintiffs' care.

Thereafter, plaintiffs filed two lawsuits, claiming that they had been wrongly separated from Ashley. Plaintiffs made various allegations against defendants, including negligence, breach of statutory and contractual duties, bad faith, and violation of their constitutional rights. The trial court subsequently granted the DSS defendants' motion for summary disposition on the basis of qualified immunity. With regard to the CAS defendants, the trial court denied their motion for summary disposition on the

basis of absolute immunity, but granted the motion pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). The trial court dismissed plaintiffs' claims and denied plaintiffs' motion for leave to amend their complaint. Plaintiffs now appeal as of right, and the CAS defendants cross appeal.

I

The DSS defendants were protected from liability unless their conduct violated a clearly established statutory or constitutional right of plaintiffs of which the DSS defendants should have known.[1] *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S. Ct. 2727; 73 L.Ed.2d 396 (1982). As plaintiffs argue, there is a constitutional right to family integrity. *Santosky v. Kramer*, 455 U.S. 745, 753; 102 S. Ct. 1388; 71 L.Ed.2d 599 (1982). However, this is not an absolute right, and it must be balanced against the state's interest in protecting children's health and welfare. *Frazier v. Bailey*, 957 F.2d 920, 929-930 (CA 1, 1992). See also *Santosky, supra* at 766 (state has parens patriae interest in the welfare of the child). Similarly, the statute that plaintiffs rely upon as granting them a right[2] to reunification with Ashley only states that reunification "may" occur

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[1] The DSS defendants may also be protected by judicial immunity as discussed in part II of this opinion. However, plaintiffs' claim against the DSS defendants rests, in part, upon 42 U.S.C. 1983, and it is not clear whether judicial immunity is afforded to social workers under that statute. *Hoffman v. Harris*, 511 U.S. ___; 114 S.Ct. 1631; 128 L.Ed.2d 354 (1994) (Thomas, J., dissenting).

[2] We assume without deciding that the statute plaintiffs rely upon grants them a right.

"as soon as it appears possible." M.C.L. 400.18c; M.S.A. 16.418(3).

The trial court correctly granted summary disposition for the DSS defendants. Their involvement with the case was only to review reports filed by the CAS personnel contracted to handle Ashley's placement. There is no factual evidence to support a finding that, in doing so, the DSS defendants knew that plaintiffs' constitutional or statutory right to reunification was being denied. That right had to be balanced against the interest in protecting Ashley's health and welfare, including protecting her from abuse. In repeatedly adopting the CAS recommendations against reunification, the probate court implicitly determined that this approach represented an appropriate balancing of these competing interests. Nothing in the record indicates that, by similarly accepting the CAS recommendations, the DSS defendants' conduct violated any statutory or constitutional interest plaintiffs had in reunification.

II

In their cross appeal, the CAS defendants argue that the trial court improperly denied their motion for summary disposition on the basis of immunity. We agree.[3]

Federal appellate courts have extended absolute immunity to social workers initiating and monitoring

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[3] Because we decide that summary disposition should have been granted on immunity grounds, we do not reach the issues plaintiffs raise on appeal regarding the propriety of the trial court's later dismissal of their complaint against the CAS defendants on other grounds.

child placement proceedings and placements in cases similar to the instant case.[4] *Babcock v. Tyler*, 884 F.2d 497 (CA 9, 1989); *Vosburg v. Dep't of Social Services*, 884 F.2d 133 (CA 4, 1989); *Coverdell v. Dep't of Social & Health Services*, 834 F.2d 758 (CA 9, 1987); *Meyers v. Contra Costa Co. Dep't of Social Services*, 812 F.2d 1154 (CA 9, 1987); *Kurzawa v. Mueller*, 732 F.2d 1456 (CA 6, 1984).[5] These

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[4] As noted earlier, immunity may be unavailable for social workers in an action brought under 42 U.S.C. 1983. However, plaintiffs do not allege a cause of action against the CAS defendants under that section. The concerns expressed by Justice Thomas in *Hoffman* regarding whether social workers existed or were provided immunity when § 1983 was enacted in 1871 are thus not applicable. See *Hoffman, supra* n. 1, 128 L.Ed.2d 355-356 (Thomas, J., dissenting).

[5] We find all these cases persuasive with respect to the CAS defendants, even though, as the dissent points out, most involved governmental employees. The distinction between governmental and nongovernmental employees is important only under statutes like M.C.L. 691.1407(5); M.S.A. 3.996(107)(5), but no such statute was at issue in these precedents, and the immunity we afford to the CAS defendants does not arise from this kind of statute. Further, while *Kurzawa* has been described as granting "blanket absolute immunity" to social workers, as the dissent notes, our decision is not properly so described. It is limited to the facts of this case, in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy. Finally, the dissent correctly notes that these cases all involved § 1983 claims, but the immunity afforded seems equally available with regard to other claims. See, e.g., *Kurzawa, supra*, 732 F.2d 1458 (in dicta, the court noted that "notwithstanding their already successful statute of limitations defense, the other defendants [a psychologist, two psychiatrists, and a lawyer functioning as guardian ad litem sued under negligence, malpractice, and other state law theories] would have also been entitled to immunity").

precedents recognize the important role that social workers play in court proceedings to determine when to remove a child from the home and how long to maintain the child in foster care. They also recognize that, to do that difficult job effectively, social workers must be allowed to act without fear of intimidating or harassing lawsuits by dissatisfied or angry parents. *Kurzawa, supra* at 1458.

> [C]aseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision. . . . There is little sense in granting immunity up through adjudication . . . and then exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders. [*Babcock, supra* at 503.]

Accord *Coverdell, supra* at 765 ("[T]o permit the [social] worker to become 'a lightning rod for harassing litigation . . . ' would seriously imperil the effectiveness of state child protection schemes.").

When a court is involved, granting immunity from civil suit does not mean that the parents of a child taken from their home are without recourse to contest wrongful conduct by a social worker. "The parent of the apprehended child is not left remediless – he or she may always attack the court's order directly or on appeal." *Id.* Accord *Vosburg, supra* at 136 ("[S]afeguards against . . . misconduct were built into the . . . adjudication process itself.").

Although we have found no Michigan precedent regarding this question, we find convincing the decisions granting absolute immunity to social workers. As the CAS defendants persuasively point out in their brief, absolute immunity is necessary to assure that our important child protection system can continue to function effectively:

> No more heinous act can be alleged than the physical abuse of a helpless infant by an adult. The volatile mix of accused parents, deprived of the custody of the baby, observing it in the care of foster parents, finding themselves in the unfamiliar confines of the court system, required to retain counsel at great cost, subject to the social services bureaucracy and its necessary interrogation and probing of the most intimate aspects of the family psyche, is almost guaranteed, rightly or wrongly, to produce resentment and a desire for retribution by the parent. Many parents in this situation are seriously psychologically disturbed.
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> Professional assistance to the Probate Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children. Its advisors and agents cannot be subject to potential suits by persons, aggrieved by the Court's decision vindictively seeking revenge against the Court's assistant as surrogates for the jurist. Faced with such liability, the social worker would naturally tend to act cautiously and refrain from making difficult decisions, delay in intervening to protect the child, avoid confronting the aggressive parent with the necessity of changing his attitudes and seeking psychiatric help to do so.

> Such an atmosphere defeats the function of the continuing jurisdiction of the Probate Court in the abstract, and in reality poses the potential for death for an abused child who is not protected because the social worker exercised excessive caution in arriving at a judgment as to whether there is sufficient evidence of abuse to merit action on his or her part.
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> Mere qualified immunity is not enough protection to prevent the chilling effect of a potential suit on the exercise of a social worker's professional judgment and discretion in operating as an arm of the Probate Court to protect abused children. This litigation is vivid proof of that. Judge Stephens has ruled that Cross-Appellants have qualified immunity, but that has not prevented years of litigation. The threat of a suit like this one could make any social worker back off from making discretionary decisions that he or she would otherwise believe to be in the child's best interest.

Further, plaintiffs have not been without a remedy regarding the allegedly wrongful conduct of the CAS defendants. The probate court regularly reviewed the placement recommendations of the CAS defendants at statutorily required hearings. This provided judicial oversight sufficient to protect plaintiffs from allegedly wrongful conduct against their interests by the CAS defendants. Plaintiffs had the statutory right to request accelerated hearings to contest their case service plan. M.C.L. 712A.19(3); M.S.A. 27.3178(598.19)(3). The probate court had broad power to address concerns with the case service plan if, after a hearing, they were found to be legitimate. MCR 5.973(B). To allow plaintiffs additional

protection in the form of a cause of action against the CAS defendants for money damages would be too costly; it would "disserve the broader public interest in having participants [in contested child protection cases] . . . perform their respective functions without fear of having to defend their actions in a civil lawsuit." *Babcock, supra* at 502.

Although the trial court incorrectly denied summary disposition for the CAS defendants on the basis of immunity, the trial court did reach the right result by granting them summary disposition on other grounds. *In re Powers,* 208 Mich.App. 582, 591; 528 N.W.2d 799 (1995); *Henry v. Hospital & Health Services Credit Union,* 164 Mich.App. 90, 94; 416 N.W.2d 338 (1987). The trial court's order granting summary disposition for the DSS defendants and for the CAS defendants are affirmed.

We affirm.

W. P. CYNAR, J., concurred.

WHITE, P.J. (*concurring in part and dissenting in part*). I agree with the trial court that plaintiffs failed to make the requisite showing of bad faith on the part of the Department of Social Services defendants, Kathy Hart and Warren Swihart, and thus I concur in the affirmance of the trial court's grant of summary disposition for these defendants.

I dissent from the majority's reversal of the trial court's denial of the Children's Aid Society (CAS) defendants' motion for summary disposition on absolute

immunity grounds.[1] I also conclude that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) and (10), a question not reached by the majority.

I

In addition to the facts set forth in the majority opinion, I note that Ashley remained in foster care under the supervision of the CAS and the DSS from December 19, 1984, to May 19, 1988. Throughout that time, plaintiffs denied having abused Ashley and presented medical evidence that supported their claim that Ashley's injuries resulted from a congenital defect. Nonetheless, the DSS and the CAS insisted that plaintiffs admit responsibility for Ashley's injuries as a precondition of moving toward reintegration of the family and returning Ashley to their custody. *In re Martin*, 167 Mich.App. 715, 719; 423 N.W.2d 327 (1988). In the appeal from the probate court, this Court quoted extensively from a report by a pediatric psychologist submitted at one of the statutory rehearings, held in October 1987, which referred to defendants' insistence that plaintiffs "confess":

> 1. A major issue in this case is whether Ashley's medical condition at the time of the original report to Children's Protective Services was due to child abuse or copper deficiency. The full report from Dr. Paterson and confirmatory evidence from Dr. Parfitt were not available to

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[1] I agree with the result with respect to Stoval, concluding that Stoval has not been shown to have been involved in the management of plaintiffs' case.

> the jury which heard the case in January of 1986. These reports are sufficiently convincing as to throw doubt on the original diagnosis of child abuse, which was made on the basis of the finding of multiple fractures in different stages of healing.
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> 2. A second major issue in the case has been the *continuing demand by professionals that the Martins accept responsibility for Ashley's fractures. There has been an assumption that the Martins' failure to confess guilt means that Ashley cannot be safe in their home, even for a trial period, such as overnight or on weekend visitations.*
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> *These two issues have interacted to keep any progress from occurring in reuniting this family.* If, in fact, the Martins were not responsible for the injuries to their daughter, Ashley, but the injuries, rather, were the result of copper deficiency, the demand that the parents accept responsibility of the injuries makes no sense. Furthermore, although acceptance of responsibility by the perpetrator is often a treatment goal in child protection cases, particularly cases of incest, it is not unknown for children to be returned to their natural families even when a specific perpetrator has not been identified. Gradual return of children in cases where there is no criminal prosecution is the general practice, not the exception, with close medical monitoring to insure that reinjury does not occur. [*Id.* at 728 (emphasis added).]

Another report from Dr. Coy Denton Sims, a Ph.D. in pediatric-child-school and family therapy, noted that plaintiffs attended three separate parenting seminars, received certificates of honor from two of them, and

underwent nearly three years of evaluations and psychotherapy. Dr. Sims believed there would be no risk in returning Ashley to plaintiffs. *Id.* at 721, 730-731. Finally, this Court noted:

> Since the adjudicative hearing [in January 1986], petitioner has presented no evidence, except for the fact of Ashley's injuries, that respondents were, or could be, abusive to the child. While the injuries themselves might be a strong indicia of abuse where no legitimate explanation exists for their infliction, such is not the case here. Very persuasive evidence from Dr. Paterson and Dr. Parfitt show that the cause was copper deficiency or some similar metabolic disorder. Although, as we have previously stated, enough contrary testimony exists for affirming the probate court's jurisdiction over Ashley, *that evidence certainly defeats petitioner's past insistence that respondents admit responsibility for the abuse before it would consider returning the child. Such rigidity has no place in our child welfare system.* As stated in the report by Dr. Sims: "A life sentence (or three years) for Ashley appears beyond the purpose of the Department of Social Services or intent of the court." [*Id.* at 731-732 (emphasis added).]

DSS defendant Hart, Swihart's supervisor, testified she and Swihart became involved in the Martin case around April 1, 1986. Swihart testified at deposition that the permanency plan when Ashley was first placed in the court's wardship was to reunite her with plaintiffs. However, in March 1987 the plan changed to file for permanent custody and a termination of plaintiffs' parental rights. Swihart testified that the reason for this change

was that CAS defendant Celia B. Clayton felt that "the parents were not recognizing that there was abuse." Swihart testified he agreed with Clayton's recommendation because he had "to go on what she's doing in her work and what she sees and reports to me," specifically, Ashley's reaction after she was with her natural parents for a short period. Swihart never observed plaintiffs with Ashley. Swihart testified that he did not know why plaintiffs were not allowed to visit with Ashley outside the CAS' premises between April 1986 and October 1987 and that "we let the contract agency run the case the way they feel – they're working directly with them." A petition for termination of plaintiffs' parental rights was never filed, however.

Subsequently, plaintiffs filed two civil complaints, which were amended several times to clarify and narrow the numerous theories alleged.

In their first suit, filed on March 10, 1988, plaintiffs named the DSS, the CAS, Bennie Stoval (CAS' director), Clayton, and Dr. Herman Schornstein, the doctor who evaluated plaintiffs and Ashley. Plaintiffs' original complaint alleged that the CAS acted in bad faith by deliberately prolonging Ashley's temporary foster care, deliberately preventing meaningful contact between child and parents, deliberately allowing the foster parents to move 150 miles away, and insisting that plaintiffs confess to abusing Ashley as the precondition for her return and as the apparent precondition for any effort to reintegrate Ashley into the Martin home. Plaintiffs further alleged that the CAS, the DSS, and the individual defendants Hart, Kim Travis-Ewing, and Clayton acted in bad faith by intentionally creating and filing unfair, biased, and

misleading reports.[2] Plaintiffs alleged they lacked an adequate remedy at law and had been unable to obtain an adjudication of their "constitutional and other claims under circumstances where lives are being destroyed by delay."

Plaintiffs' complaint was amended twice. Plaintiffs' motion to file a second amended complaint, stated that the proposed second amended complaint "clearly sets forth three Counts and three theories of recovery upon which plaintiffs seek damages from defendants."[3] The motion also stated that although the second amended complaint was substantially abbreviated, it was based on the identical facts alleged in the earlier pleadings and "merely seeks to identify with specificity the theories on which they seek relief."

Plaintiffs' second amended complaint alleged in count I that defendants CAS, Stoval, and Clayton "by statute and pursuant to contract with the DSS," were

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[2] Plaintiffs alleged they were repeatedly threatened with permanent termination of their parental rights because they would not confess to abusing Ashley, but that no petition had ever been filed. Plaintiffs alleged that they were not told of the foster parents' move to Mt. Pleasant (150 miles away) until after the DSS and the CAS approved the move and that no court order was obtained permitting the move. Plaintiffs alleged that the DSS and the CAS conspired to and did obstruct justice in state court proceedings by conspiring with defendant Schornstein to change his medical recommendation regarding plaintiffs from favorable to harshly critical for the purpose of prevailing in a permanent termination proceeding and that Schornstein gave false testimony before the probate court.

[3] The trial court had requested clarification of plaintiffs' claims.

obligated to direct its activities toward the reintegration of plaintiffs' family and that they owed plaintiffs a number of duties, which included to encourage and support an ongoing relationship between plaintiffs and Ashley, to identify and articulate barriers and problems inhibiting Ashley's return, to encourage and promote visitation, and to develop realistic treatment and service plans that would result in reunification of the family. No specific statute was mentioned. Plaintiffs alleged that the CAS defendants were negligent and breached each of those duties. Count II alleged that the CAS defendants breached the 1982 contract that they had with the DSS, referring to the duties outlined in count I. Count III alleged defendant Schornstein breached duties that he owed to plaintiffs, was negligent, and acted in bad faith by failing to consider adequately medical evidence suggestive of a physical etiology for Ashley's injuries, improperly evaluated plaintiffs' interactions with Ashley as consistent with parental abuse parents, and made recommendations regarding future interactions not for the purpose of eventual reunification of the family, but in bad faith and in conspiracy with the CAS and Clayton.

Plaintiffs' second suit was filed on March 2, 1989, after Ashley was returned to their custody. Plaintiffs named CAS caseworkers Andrea Zak and Travis-Ewing and DSS agents Swihart and Hart. The complaint alleged Zak and Travis-Ewing were responsible for overseeing the foster care placement and determining the permanent custody of Ashley and that they acted in bad faith and in a premeditated fashion by not filing a petition for termination or promoting Ashley's return, by deliberately prolonging temporary foster care, by deliberately preventing

meaningful contact between Ashley and plaintiffs, and by insisting that plaintiffs confess to having abused their daughter as the precondition for her return. Plaintiffs alleged that these defendants allowed the foster parents to move 150 miles away so as to attempt to permanently sever the parent-child relationship and prevent meaningful contact between plaintiffs and Ashley and, in bad faith, intentionally created and filed unfair and biased reports. Plaintiffs alleged that defendants Zak and Travis-Ewing individually and in conspiracy with Swihart and Hart acted in a gross, wanton, and wilful manner, in bad faith without adequate investigation, and in a conspiratorial manner to force plaintiffs to terminate their parental rights and that those defendants conspired to present inaccurate and misleading testimony in various court proceedings for the sole purpose of terminating plaintiffs' parental rights. Plaintiffs alleged that defendants Zak, Travis-Ewing, Swihart, and Hart knew or should have known that the allegations of child abuse against plaintiffs were false. Finally, without specifying the specific grounds relied on, plaintiffs alleged that they had suffered damages as a direct and proximate result of defendants' "negligence and unlawful and unconstitutional conspiratorial acts."

A litany of summary disposition motions were filed by defendants. Swihart, Hart, and Susan Green, DSS workers, moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), contending they were entitled to absolute immunity, qualified immunity, and immunity under § 5 of the Child Protection Law, M.C.L. 722.625; M.S.A. 25.248(5), and that plaintiffs failed to state any valid claim against them.

The trial court found that although plaintiffs had a substantive due process right to reunification of their family under the child welfare act,[4] which applies to post-dispositional monitoring and activities intended to reunify families, none of the evidence presented indicated that Swihart or Hart acted in bad faith. The court found that these acts did not rise to the level of bad faith necessary to support a constitutional claim, and the court concluded that defendants Swihart and Hart[5] were entitled to qualified immunity. The court granted their motion for summary disposition.

Dr. Schornstein moved for summary disposition on November 27, 1990, arguing that he was entitled to judicial immunity and that the claims against him lacked merit. On January 11, 1991, the CAS, Stoval, and Clayton moved for summary disposition, arguing, inter alia, that they were entitled to absolute quasi-judicial immunity and governmental immunity.

On January 14, 1991, Zak and Travis-Ewing moved for summary disposition, arguing that they were also entitled to absolute quasi-judicial immunity and that plaintiffs' action was barred by collateral estoppel. Finding that the issue of absolute immunity for the CAS, Stoval, Clayton, Zak, and Travis-Ewing (the CAS defendants) had been previously considered and denied,[6] the

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[4] The record indicates the trial court was referring to the Child Protection Law, M.C.L. 722.621 *et seq.*; M.S.A. 25.248(1) *et seq.*

[5] Defendant Green was also dismissed at this hearing.

[6] In May 1989, the CAS, Stoval, and Clayton sought summary disposition on the basis that they are entitled to

court declined to reconsider it. However, the court found that the CAS defendants would be entitled to qualified immunity unless plaintiffs could prove that they acted in bad faith. On these grounds, the court denied summary disposition in a March 14, 1991, order. The court also held that Dr. Schornstein was not entitled to absolute immunity though he could be entitled to qualified immunity.

All parties appealed. Finding that the March 14, 1991, order denying Zak and Travis-Ewing's motion for summary disposition was not a final order, a panel of this Court denied their appeal. However, this Court remanded the matter to the trial court with respect to the claim against Dr. Schornstein. Unpublished order of the Court of Appeals, entered October 17, 1991 (Docket No. 139548), which stated:

> The Court orders . . . the [two] orders of the Wayne Circuit Court [denying defendant Schornstein's motions for summary disposition] are vacated and the case REMANDED for further consideration not inconsistent with this order.
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> Statements made by witnesses in the course of judicial proceedings are absolutely privileged provided they were relevant, material or pertinent to the issue being tried, and Michigan recognizes no cause of action for perjury or false swearing. *Meyer v Hubbell*, 117 MichApp 699, 704, 709; 324 NW2d 139 (1982). Testimony given

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absolute immunity as "integral parts of the judicial process." The court granted the motion in part and denied it in part, striking allegations relating to conduct integral to the judicial process and concluding that plaintiffs also alleged conduct that would fall outside the scope of the judicial process.

by Dr. Schornstein at the dispositional hearing is therefore absolutely privileged. Furthermore, persons providing testimony, reports or other information at the request of the court which are [sic] relevant and material to proceedings following authorization of a petition for child abuse are immune from any subsequent legal action with respect to furnishing the information to the court. MCR 5.924. Any written or other information provided by Dr. Schornstein to the probate court at that court's request cannot be the predicate for any action against him.

A governmental officer, employee, agent or volunteer is not liable in tort for injuries to persons or damages to property unless that person's conduct amounts to gross negligence that is the proximate cause of the injury or damage. Because Dr. Schornstein's testimony in court is absolutely privileged, plaintiffs cannot prevail unless they can show that Dr. Schornstein was grossly negligent in some other manner, and that such gross negligence was not only the cause in fact of any injury they suffered, but also was so significant and important as to be regarded as the proximate cause of plaintiffs' loss. In part, this depends on whether it is foreseeable that Dr. Schornstein's allegedly grossly negligent conduct could create a risk of harm to plaintiffs and whether the results of that conduct and intervening causes were foreseeable. *McMillan v State Highway Commission*, 426 Mich 46, 61-62; 393 NW2d 332 (1986). If reasonable minds could not differ regarding the application of the reasonableness of the risk of the harm, the question is one for the court. 426 Mich at 63.

> On remand the circuit court shall reconsider Dr. Schornstein's motions for summary disposition in light of these authorities.

In December 1991, the CAS defendants again moved for summary disposition, arguing that they were entitled to absolute immunity on the basis of this Court's ruling in the Schornstein case. The trial court rejected the CAS defendants' argument under the law of the case and again denied their motion for summary disposition.

Plaintiffs and the remaining parties, the CAS, Stoval, Clayton, Travis-Ewing, and Zak, prepared for trial, which was set for April 1.

On April 24, 1992, the trial court entered sua sponte an order granting the CAS defendants summary disposition and dismissing all of plaintiffs' claims pursuant to MCR 2.116(C)(8) and (10).

II

I agree with the trial court that plaintiffs failed to make the requisite showing of bad faith[7] on the part of DSS defendants Hart and Swihart, and, thus, I concur in the affirmance of the trial court's grant of summary disposition for these defendants.

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[7] The trial court at the summary disposition hearing, during a review of plaintiffs' attached excerpts of Swiehart's [sic] deposition, asked plaintiffs' counsel, "Counsel, you do not have any evidentiary items to present to this Court that would indicate that Mr. Swiehart [sic] was aware of any negligence, bad faith or conspiracy on the part of CAS; do you?" Plaintiffs' counsel responded, "No."

III

I dissent from the majority's reversal of the trial court's denial of the CAS defendants' motion for summary disposition on absolute immunity grounds.

A

The CAS defendants are not government officials or employees, and governmental immunity is not properly extended to private actors. *Roberts v. Pontiac*, 176 Mich.App. 572, 576-578; 440 N.W.2d 55 (1989); *Jackson v. New Center Community Mental Health Services*, 158 Mich.App. 25, 34-35; 404 N.W.2d 688 (1987). A private party's performance of a governmental function does not confer governmental agency status on that entity. *Id.*

Defendants' citations of federal law notwithstanding, in Michigan absolute immunity is accorded only to

> judges, legislators, and the elective or highest appointive executive officials of all levels of government . . . from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority. [M.C.L. § 691.1407(5); M.S.A. 3.996(107)(5).]

This standard applies to claims accruing after July 1, 1986, and is substantially similar to the prior standard set forth in *Ross v. Consumers Power Co* (*On Rehearing*), 420 Mich. 567, 592; 363 N.W.2d 641 (1984), which governs claims accruing before July 1, 1986:

> Judges, legislators, and the highest executive officials of all levels of *government* are absolutely immune from all tort liability whenever

> they are acting within their respective judicial, legislative, and executive authority. [Emphasis added.]

Governmental officials who have been extended absolute immunity by Michigan courts when acting within their respective authority include: a county prosecutor,[8] the Detroit Police Department's chief of police,[9] the director and deputy director of the Department of Corrections,[10] and the state superintendent of public instruction.[11] With regard to governmental immunity of lower-level employees, qualified immunity is accorded to officers and employees of a *governmental* agency. *Ross, supra* at 592; M.C.L. 691.1407(2); M.S.A. 3.996(107)(2).

B

The cases relied on by the majority all involve § 1983 claims. Further, four of the five cases involve governmental employees, specifically social workers employed by various state departments of social services, or state departments of child protective services. *Babcock v. Tyler*, 884 F.2d 497, 498 (CA 9, 1989); *Vosburg v. Dep't of Social Services*, 884 F.2d 133, 134 (CA 4, 1989); *Coverdell v. Dep't of Social & Health Services*, 834 F.2d 758, 759 (CA 9, 1987);

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[8] *Bischoff v. Calhoun Co. Prosecutor*, 173 Mich.App. 802; 434 N.W.2d 249 (1988).

[9] *Meadows v. Detroit*, 164 Mich.App. 418; 418 N.W.2d 100 (1987).

[10] *Chivas v. Koehler*, 182 Mich.App. 467, 471; 453 N.W.2d 264 (1990).

[11] *Berlin v. Superintendent of Public Instruction*, 181 Mich.App. 154, 161-162; 448 N.W.2d 764 (1989).

Meyers v. Contra Costa Co. Dep't of Social Services, 812 F.2d 1154 (CA 9, 1987).

Kurzawa v. Mueller, 732 F.2d 1456 (CA 6, 1984), the fifth case cited in the majority opinion, involved seven defendants, three of whom were employees of Michigan's Department of Social Services. *Id.* at 1457. The four remaining defendants included two psychiatrists, one psychologist, and an attorney acting as the child's guardian ad litem; all were involved in the DSS' removal of the child from his parents. *Id.* at 1457-1458. The *Kurzawa* court found all the defendants were entitled to absolute immunity from the plaintiffs' 42 U.S.C. 1983 claim, but based its decision on the respective functions: the DSS employees were immune because, as state employees, they had the responsibility for the prosecution of child neglect and delinquency petitions to protect the state's interest in protecting the child and their conduct was consequent to the prosecution of the petition; the psychiatrists and psychologist who examined the child were immune because the information they provided to the DSS and the courts was analogous to the testimony of a witness; and the guardian ad litem was entitled to immunity because of his position within the judicial process. *Id.* at 1458. Unlike the defendants in *Kurzawa*, the CAS defendants are not psychiatrists, psychologists, or guardians ad litem, nor are their challenged acts relegated to participation in judicial proceedings. Rather, plaintiffs assert the CAS defendants provided out-of-court foster care services that were a product of their independent judgment as social workers, including curtailing plaintiffs' visitation with Ashley, threatening to terminate plaintiffs' parental rights, insisting that plaintiffs confess

to abusing Ashley, and supervising the relationship between the foster care and the visitations with the natural parents in a manner so as to contravene any possibility of reunification of the family.

Further, the *Kurzawa* holding regarding absolute immunity applied only to the plaintiffs' 42 U.S.C. 1983 claims.[12] Indeed, the United States Supreme Court

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[12] The majority concedes, in its n. 5, *ante* at 655, that the cases it relies on, including *Kurzawa*, involved 42 U.S.C. 1983 claims, but concludes that "the immunity afforded seems equally available with regard to other claims," relying on the following dicta in *Kurzawa, supra*, 732 F.2d 1458.

> Notwithstanding their already successful statute of limitations defense, the other defendants [a psychologist, two psychiatrists and a guardian ad litem] would have also been entitled to immunity.

The proceedings in *Kurzawa* are somewhat unclear. It appears from the district court opinion, 545 F.Supp. 1260 (EDMich, 1982), that the plaintiffs brought § 1983 claims against all seven defendants and additionally brought pendent state claims under the Michigan Handicappers' Civil Rights Act (MHCRA), M.C.L. 37.1101 *et seq.*; M.S.A. 3.550(101) *et seq.*, (against all defendants), and for common law negligence and malpractice (against two state defendants and three mental health professionals.) Four defendants, including the three state defendants, brought motions to dismiss the § 1983 claims on statute of limitations grounds. The district court held that the minor's claim was not barred, but dismissed the parents' § 1983 claim against all defendants on the basis of the statute of limitations. The MHCRA claim was brought only with respect to the parents and was dismissed with respect to all the defendants on the basis of the statute of limitations. The parents' malpractice claim against the five defendants was dismissed as well on statute of limitations grounds, but the minor's was not. One of the mental health professionals also sought dismissal of the § 1983 claims on the basis of failure to state a claim. The

decision the CAS defendants rely on and the *Kurzawa* court relied on, *Briscoe v. LaHue*, 460 U.S. 325; 103 S. Ct

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court concluded that the plaintiffs' allegations were conclusory and dismissed the § 1983 claims against all the nonstate defendants on this basis, thus dismissing the minor's claim as well as the parents'. The plaintiffs conceded that the state-law claims against one of the mental health professionals should be dismissed. The court then dismissed the remaining state-law claims against the private defendants for lack of pendent jurisdiction, having dismissed the § 1983 claims. Later, apparently in an unreported decision, the district court dismissed the minor's remaining § 1983 claims on immunity grounds. On appeal, the Court of Appeals stated:

> We agree with the district court's determinations regarding the various statutes of limitations and their application to this lawsuit. We also agree that the remaining defendants are entitled to immunity. However, we reach the same result for different reasons. [732 F.2d 1458]

The court then discussed *Briscoe v. LaHue*, 460 U.S. 325; 103 S.Ct. 1108; 75 L.Ed.2d 96 (1983), *Butz v. Economou*, 438 U.S. 478; 98 S.Ct. 2894; 57 L.Ed.2d 895 (1978), and *Imbler v. Pachtman*, 424 U.S. 409; 96 S.Ct. 984; 47 L.Ed.2d 128 (1976), and concluded "that the defendants are entitled to absolute immunity. The remaining defendants are state employees who are responsible for the prosecution of child neglect and delinquency petitions in the Michigan courts." *Id.* The "remaining defendants" refers to the state defendants for whom the minor's § 1983 claims were not dismissed for failure to state a claim, and for whom the parents' § 1983 and state claims were dismissed on the basis of the statute of limitations. The court went on to state, in dicta, that the other defendants, who had already prevailed on different grounds, would also be entitled to immunity under *Briscoe*.

It is not at all clear that the dicta at issue addressed the plaintiffs' state-law claims in addition to their § 1983 claims. Moreover, the dicta relies on *Briscoe*, which was also a § 1983

1108; 75 L.Ed.2d 96 (1983), addressed only immunity in 42 U.S.C. 1983 claims.

Moreover, to the extent *Kurzawa* can be understood to grant blanket absolute immunity, it has been criticized in the federal courts, and its approach disapproved of. See *Gardner v. Parson*, 874 F.2d 131, 145 (CA 3, 1989) (stating with respect to the *Kurzawa* court's holding that guardians ad litem are absolutely immune: "[T]he court did not analyze the precise function of the guardian ad litem . . . and we are hesitant to grant a blanket of absolute immunity to all guardians ad litem in the performance of all their duties."). The *Gardner* court noted that the Courts of Appeal for the First, Fifth, and Ninth Circuits have taken functional approaches in deciding absolute immunity questions, focusing on the specific challenged conduct and not granting blanket immunity.

In cases decided after *Kurzawa*, the United States Supreme Court has utilized the functional approach in addressing questions of absolute immunity in 42 U.S.C. 1983 cases and has noted that "[w]e have been 'quite sparing' in our recognition of absolute immunity . . . and have refused to extend it any 'further than its justification would warrant.' " *Burns v. Reed*, 500 U.S. 478, 487; 111 S. Ct. 1934; 114 L.Ed.2d 547 (1991). See also *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-271; 113 S. Ct. 2606; 125 L.Ed.2d 209 (1993).

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case and advanced the functional approach toward absolute immunity analysis. That approach is discussed *infra* and, when applied to the facts presented here, militates against extending absolute immunity to the CAS defendants.

The Court of Appeals for the Sixth Circuit in *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (CA 6, 1989), held that no absolute immunity was available to a DSS social worker who opened a child abuse case, investigated it, and placed a parent's name in the DSS' central registry of abuse and neglect, because these were administrative or investigatory functions, and not prosecutorial or judicial functions or otherwise intimately related to the judicial process. In *Snell v. Tunnell*, 920 F.2d 673, 689 (CA 10, 1990), the Court of Appeals for the Tenth Circuit affirmed the denial of absolute immunity to governmental employee social workers and supervisors, noting that "[w]hen the activity of a social worker is not integral to the judicial process, absolute immunity is not warranted." The plaintiffs had alleged that the social worker defendants were liable under 42 U.S.C. 1983 for activities occurring during the investigation of their foster home. *Id.* at 676-677. In *Spielman v. Hildebrand*, 873 F.2d 1377, 1383 (CA 10, 1989), the court held that nontestimonial actions by social workers, including their decision to remove a foster child without affording the plaintiffs an agency hearing, were not integral to the judicial process and that the social workers were not entitled to absolute immunity for those actions. Similarly, in the instant case, plaintiffs' allegations included acts that would not be entitled to absolute immunity under these cases.

C

I also find no merit in arguments of the CAS defendants that they are entitled to quasi-judicial derivative immunity on the basis that they were simply following the probate court's orders and that they were entitled to

summary disposition on the basis of this Court's order remanding defendant Schornstein's motion for summary disposition to the trial court for reconsideration. Plaintiffs alleged wrongful acts that did not involve execution of the court's order, and the actions of the CAS defendants extended beyond providing testimony, reports, and recommendations to the probate court. See *Snell, supra*, 920 F.2d 693, n. 19. Further, unlike Schornstein, defendants are not governmental actors. Additionally, the CAS defendants have not shown that there is a common-law counterpart historically accorded to social workers, as required by *Butz, supra*. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432-434; 113 S. Ct. 2167; 124 L.Ed.2d 391 (1993) (holding that a court reporter was not absolutely immune from suit for failure to produce a federal criminal trial transcript, because there was no common-law judicial immunity accorded court reporters and because they are not integral to the judicial process).[13]

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[13] Justice Thomas' dissent in a recent denial of a petition for a writ of certiorari in *Hoffman v. Harris*, 511 U.S. ___; 114 S.Ct. 1631; 128 L.Ed.2d 354, 355-356 (1994), noted disapproval of extending absolute immunity to social workers:

> The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983.

D

The argument of the CAS defendants that they are entitled to immunity under the Child Protection Law[14] is also rejected because plaintiffs assert bad faith,[15] *Awkerman v. Tri-County Orthopedic Group, PC*, 143 Mich.App. 722, 726-727; 373 N.W.2d 204 (1985).

III

Plaintiffs next argue the trial court abused its discretion by granting sua sponte summary disposition for the CAS, Stovall, Clayton, Zak, and Travis-Ewing pursuant to MCR 2.116(C)(8) and (10) when no motion for summary disposition was pending. The trial court's opinion and order is entitled "order granting summary disposition under MCR 2.116(C)(8) and (10) and denying leave to amend," although it appears that no motion to amend was before the court. The opinion states in pertinent part:

> In their present posture the instant cases claim negligence based upon violation of statute, ordinance or contract. The complaint before the court as of this date does not plead nor [sic] statutory ordinary negligence or professional

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[14] While the applicability of that law to the instant case is not clear, plaintiffs have not appealed the trial court's decision that the statute applies.

[15] The second amended complaint in the 1988 case (CAS, Stoval, and Clayton) specifically alleges bad faith. While the original complaint and first amended complaint in the 1989 case (Zak and Travis-Ewing) alleged bad faith, the second amended complaint does not use the phrase in relation to these defendants; nonetheless, the specific allegations allege acts that could be seen as constituting bad faith.

negligence. The complaint was amended three times before the last set of Court of Appeals Orders. It has not been amended since. At a hearing on settlement of jury instructions, the court was posed with the issue of whether the plaintiff could meet its burden of going forward on the claim as pleaded. Upon review and reflection, the court determines that the plaintiff cannot present a statute upon which negligence can be predicted [sic] and did not plead or give notice of non-statutory or professional negligence. An amendment at this time would severely prejudice the defendant and, therefore, will not be allowed. Therefore, dismissal under MCR 2.116(C)(10) and (8) is *granted*.

* * *

Plaintiff offered the Child Welfare and Protection Act as the basis of this claim. In this Act under definitions the department is defined as the Department of Social Services. The plaintiff argues that the department control [sic] with C.A.S. made C.A.S. the department for the purposes of duties. If this were true, absent gross negligence, C.A.S. would be cloaked in governmental immunity. Gross negligence wasn't plead [sic]. Further a governmental entity cannot contract away its statutory obligations. C.A.S. is neither named nor described in the subject statute.

Plaintiff has argued that the defendant's [sic] have acknowledged that they had certain duties regarding the preservation of the family unit. Assuming this to be true, this duty either arises out of the D.S.S./C.A.S. contract or out of the standard of care of [sic] profession of social work. Contractual negligence is arguably

> pleaded and/or is an issue on which sufficient notice to avoid prejudice has been given. However, the Martins were not in privity of contract with the Department of Social Services or C.A.S. [W]ithout privity a claim could only be brought under intended beneficiary theories. The D.S.S./C.A.S. contract was not one where Mr. and Mrs. Martin were intended beneficiaries. If anyone, Ashley was such a person. However, even she does not qualify as an intended beneficiary under Michigan Law so as to give her standing to enforce the contract.
>
> This leaves us with only professional standards creating the duties allegedly admitted by defendants. At no time was this claim pleaded or noticed. As to plaintiff's [sic] asertion [sic] that this case should go forward on ordinary negligence not based on a statute, this claim is, also, rejected. First there is no such pleading. Secondly, this case has proceeded on claims of specific breaches of duties which are imposed, as noted earlier, either by professional standards or contract.
>
> Regrettably, this case is dismissed and the plaintiffs are left with no relief.

The CAS defendants argue that at the numerous summary disposition hearings, and in writing in response to various motions, plaintiffs, although purporting to set forth all claims relied on, never mentioned professional negligence. The CAS defendants' motion in limine, filed on January 10, 1992, stated in pertinent part:

> The duties Plaintiffs allege are at paragraphs 22-24 of their Second Amended Complaint. These duties, allegedly flowing from the statute, are not articulated by any statute known

> to Defendants. Defendants request that the court rule on the legal issue of what duty Plaintiffs were owed under what statute and limit evidence at trial to evidence of breach of those duties only.

At the motion in limine hearing on February 21, 1992, defense counsel again stated that the CAS defendants had no notice of what duties plaintiffs were owed and said "that's what the motion [in limine] points to." The court responded:

> That is not what this motion points to. This is not a motion to strike. These [sic] is not a motion for summary disposition for failure to indicate what the statute was. We have about five of these, I assumed after the last amended complaint that whatever motions were going to be brought under C-8 indicating that there was a failure to state a claim was [sic] were going to be brought. They weren't.

At the end of the hearing, defense counsel stated:

> If I can just make sure I understand, as far as the duty issue, we're going to hash that one out in the context of Jury instructions during the pretrial conference.

In response, plaintiff's counsel stated: "That's right, Judge."

A pretrial order dated January 13, 1992, specified that the parties were to submit a joint pretrial statement by February 26, 1992, including a concise statement of the claims against each party and the defenses against each claim, noting which witnesses will actually testify with respect to each claim and defense, and proposed substantive pretrial instructions concerning the claims and

defenses as pleaded. The pretrial order stated "failure to abide by this order may result in default, dismissal, striking of answers or defenses. . . . " Trial was scheduled for April 1, 1992.

Plaintiffs' pretrial statement, entitled "Claims of the Parties: Plaintiffs' concise statement," stated that the CAS defendants owed plaintiffs the duty to gear provision of foster care services toward preserving the Martin family and that the CAS defendants failed to do so in a number of ways.

At the March 24, 1992, pretrial hearing referred to in the court's opinion and order dismissing plaintiffs' claims, while discussing the instructions, the court asked whether the case was one of "ordinary negligence," to which plaintiffs' counsel answered affirmatively. Counsel then indicated that the duty on which the negligence claim was based arose under § 8 of the Child Protection Act, M.C.L. 722.628; M.S.A. § 25.248(8), and the DSS and the CAS policy manuals. Counsel stated as well that the deposition testimony of the various defendants also established their duties. The court found that the statute set forth the DSS' duties, and was not applicable to the CAS, a private agency. The court stated that the case would proceed as an ordinary negligence case and that because defendants brought no motion for summary disposition regarding that issue, the case would proceed on that basis until an appropriate motion at the conclusion of plaintiffs' proofs.

Later during the hearing, in the course of discussing the social workers who would be witnesses at the trial,

plaintiffs' counsel indicated one social worker would testify concerning damages and the standard of care for social workers. The trial court said, "This is going to become a social workers' malpractice case," to which plaintiffs' counsel said, "It always have [sic] been," and defense counsel stated, "I do agree with that."

In the course of discussing the jury instruction regarding ordinary care, the trial court stated:

> *The Court*: . . . [Plaintiffs] are not going to get an instruction relative to violation of the statute. Understanding that, which of your [defense] witnesses will speak to whether or not there was a breach of the duty of ordinary care as between the CAS and the Martins?
>
> [*Defense counsel*]: . . . The complaint does not allege ordinary care duties arising from common law. It alleges only a breach of statute.
>
> * * *
>
> *The Court*: Looking at paragraph 23. Defendant CAS owed plaintiff's [sic] the following duties, and this is a question to the plaintiff, to encourage and support an ongoing relationship, to develop a working relationship, to advise and to reassure, to identify and articulate – this is language from what?
>
> [*Plaintiffs' counsel*]: This is language from [CAS defendant] Andrea Zak's testimony and also the Children's Aid Society placement manual and admission statement.
>
> *The Court*: And how would you characterize paragraph 23? As the duty of what, from who to who?

> [*Plaintiffs' counsel*]: Duty of reasonable care that a social worker owed to the natural parents of a child who's receiving foster care.
>
> *The Court*: So you're saying this is not a common law duty. This is, in essence, a breach of –
>
> [*Defense counsel*]: Of the proceeding [sic] paragraph says that the duty falls out of the statute.
>
> The Court: I understand that, sir.
>
> Counsels, why isn't that a claim filed under 3.001 [sic, 30.01], professional negligence. Nobody's asked for [30.01]. . . . If, in fact, this is a duty imposed upon a professional, then it has to be imposed upon a professional based upon the standard of care, and a pleading of that, by the way, which we never had.

Plaintiffs' counsel conceded that given the court's ruling that the statute did not apply, the instruction suggested by the court would be more appropriate. The court then questioned counsel concerning whether his pleadings gave notice of a professional malpractice claim. Counsel argued that the pleadings could be read to include professional negligence in the specific allegations of duty in paragraph 23 and breach in paragraph 24. However, the court was not convinced that the pleadings provided defendants with sufficient notice that the alleged duties arose out of defendants' professional capacities and indicated that though it was leaning toward entering an order of dismissal, it would consider the issue for a week:

> I'm going to chew on these. *What I suspect is I'm going to enter an order for dismissal.* I'm going to chew on it for a week. That's all I can do.

> I am concerned that we have a pleading that doesn't speak to a claim of professional negligence, that, I am not comfortable has given the defendant [sic] notice that they are to prove or to address proofs relative to whether they met the standard of care attributable to social workers within their field of expertise, whichever field of expertise of social work that may be. So I'll think about it.
>
> [*Plaintiffs' counsel*]: May I look at your Jury instructions one moment, please?
>
> *The Court*: I'm closing the record. You can look at anything you want. [Emphasis added.]

The CAS defendants had not moved for summary disposition for failure to state a claim, had not moved to strike, and had not moved for a more definite statement. Conversely, plaintiffs' counsel made no objections at this final hearing, did not request an opportunity to amend, and filed no motions or briefs before the court issued its opinion and order, not a week later, but on April 24, 1992. Nonetheless, I believe summary disposition was improper.

The trial court found that defendants would be prejudiced by a professional negligence claim because of the absence of notice, although defense counsel at the pretrial hearing indicated that the case had been a professional malpractice case.[16] Further, plaintiffs argue that the CAS

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[16] Further, plaintiffs had made reference to the issue of nonstatutory professional negligence in their response to a motion for summary disposition filed by the CAS, Stoval, and Clayton, dated June 20, 1989:

defendants had notice of the professional negligence claim as a result of discovery responses that indicated

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> Plaintiffs' Complaint includes a common-law negligence claim. Defendant CAS and its employees owed Plaintiff Martin a duty of care (or a third-person duty; *Bolton v Jones* (On Remand), 173 MichApp 725 [434 NW2d 415] (1988) to perform their functions as social workers so as to serve the goal of attempting to reunite the family. *Accord In re Bedwell*, 160 MichApp 168, 173 [408 NW2d 465] (1987).

Additionally, there was discussion of the CAS defendants' exercise of professional judgment at a motion in limine hearing on February 21, 1992, while discussing other issues:

> *The Court*: . . . [T]he interaction between the Martins and the individual defendants is going to be before the Court. And some of the conversation between the Martins and the individual – in fact, significant amounts of the conversation had to do with Children's Aid folks saying you must do X, Y and Z including the admission of responsibility, and the parents saying, no, we will do X or Y. We will not admit responsibility.
>
> Your clients, then, *applied their professional judgment one way or another with or without malice or negligence, who knows if you can prove that, but they applied their professional judgment to the situation and continued in their interaction with the Court* relative to the issue of the permanency plan for Ashley. How do we keep the Jury from knowing anything, if that's what you want, about the Martins' perception that they are not responsible?
>
> [*Defense counsel*]: . . . In the [proposed] order I specifically limit the types of evidence – set forth the types of evidence I seek to limit. One thing the Court stated just now I think needs to be responded to.
>
> *We didn't apply our professional judgment on the issue of abuse. That was applied by the Court.*

plaintiffs' intent to elicit expert testimony regarding appropriate social work techniques and as a result of depositions that also focused on standards applicable to foster care workers.

Under the circumstances, I conclude the trial court erred in foreclosing pursuit of the professional negligence claim on the basis that it was not pleaded and that amendment of the complaint would be unduly prejudicial.

I would affirm the trial court's dismissal of the DSS defendants on qualified immunity grounds, vacate the order dismissing the CAS defendants, except Stoval, and remand for further proceedings.

The Court: But you applied your professional judgment to the creation of and the monitoring of the plan. [Emphasis added.]

Michigan Supreme Court

April 1, 1997

106113-4

MICHAEL MARTIN and CYNTHIA MARTIN,

Plaintiffs-Appellants,

v

ANDREA ZAK and KIM TRAVIS-EWING,

Defendants-Appellees,

and

WARREN SWIEHART, KATHY HART, MS. GREEN, MARK HORTON, M.D., JOSEPH FISCHOFF, M.D., SHARON ANTCZAK, COUNSELING ASSOCIATES, INC., GLORIA FENISON and NORMAN NIGRO,

Defendants.

MICHAEL MARTIN and CYNTHIA MARTIN,

Plaintiffs-Appellants,

v

CHILDREN'S AID SOCIETY; BENNIE STOVAL, Director and Individually; and CELIA B. CLAYTON,

Defendants-Appellees,

and

DEPARTMENT OF SOCIAL SERVICES, WAYNE COUNTY SCHOOL SERVICES, LILLIE TABOR and HERMAN SCHORNSTEIN,

Defendants.

SC: 106113-4
COA: 152486
LC: 89-905475-CZ

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. We note that the Court of Appeals majority described its decision as being limited to the facts of this case, "in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy."

Cavanagh and Kelly, JJ., would grant leave to appeal.

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Elizabeth A. Weaver
Marilyn Kelly
Justices

ORDER
Entered: June 30, 1997

106113(87), 106114(85)

MICHAEL MARTIN and
CYNTHIA MARTIN,

Plaintiffs-Appellants,

v

ANDREA ZAK and KIM
TRAVIS-EWING,

Defendants-Appellees,

and

WARREN SWIEHART, KATHY
HART, MS. GREEN,
MARK HORTON, M.D.,
JOSEPH FISCHOFF, M.D.,
SHARON ANTCZAK,
COUNSELING ASSOCIATES, INC.,
GLORIA FENISON and
NORMAN NIGRO,

Defendants.

SC: 106113
COA:152486
LC: 89-905475-CZ

SC: 106114
COA:152489
LC: 88-805900-CZ

MICHAEL MARTIN and
CYNTHIA MARTIN,

Plaintiffs-Appellants,

v

CHILDREN'S AID SOCIETY;
BENNIE STOVAL,
Director and Individually; and
CELIA B. CLAYTON,

Defendants-Appellees,

and

DEPARTMENT OF SOCIAL
SERVICES, WAYNE COUNTY
SCHOOL SERVICES,
LILLIE TABOR and
HERMAN SCHORNSTEIN,

Defendants.

On order of the Court, the motion for reconsideration of this Court's order of April 1, 1997, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Cavanagh, Boyle and Kelly, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 30, 1997

/s/ Pauline R. Davis
Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Michael Martin

Plaintiff

-V-

Children's Aid Society

Defendant

_____/

ORDER GRANTING SUMMARY DISPOSITION UNDER MCR 2.116 (c)(8) and (10) AND DENYING LEAVE TO AMEND

This is a case where the plaintiff sued several persons involved with the supervision and care of young Ms. Ashley Martin after a judges finding of abuse on the part of the plaintiff's. There have been, at least, four cases filed at various times before this court and judge??. [sic] In their present posture the instant cases claim negligence based on violation of statute, ordinance or contract. The complaint before the court as of this date does not plead nor statutory ordinary negligence or professional negligence. The complaint was amended three times before the last set of Court of Appeals Orders. It has not been amended since. At a hearing on settlement of jury instructions, the court was posed with the issue of whether the plaintiff could meet the burden of going forward on the claim as pleaded. Upon review and reflection, the court determines that the plaintiff cannot present the statute upon which negligence can be predicted and did not plead or give notice of non-statutory or

professional negligence. An amendment at this time would severely prejudice the defendant and, therefore, will not be allowed. Therefore, dismissal under MCR 2.116 (c)(10) and (8) is *granted*.

Something was terribly wrong in the process by which the courts monitored and controlled the custody of young Ms. Martin. Evidence has been presented to this court which would support findings that various persons charged with evaluating and supervising the Martins were willfully false or careless in certain of their reports. The record supports and the Court of Appeals found that the court itself acted in a way that was an abuse of discretion. However, the Court of Appeals has already dismissed most of the persons who prepared reports and provided supervision in this case under governmental or witness immunity. Only C.A.S. and its agents remain and the plaintiff has pleaded specific violations of duties. These duties appear to track certain D.S.S. manuals and perhaps, C.A.S. manuals.

Plaintiff offered the Child Welfare and Protection Act as the basis of this claim. In this Act under definitions the department is defined as the Department of Social Services. The plaintiff argues that the department control with C.A.S. made C.A.S. the department for the purposes of duties. If this were true, absent gross negligence, C.A.S. would be cloaked in governmental immunity. Gross negligence wasn't plead. Further a governmental entity cannot contract away its statutory obligations. C.A.S. is neither named nor described in the subject statute.

Plaintiff has argued that the defendant's have acknowledged that they had certain duties regarding the preservation of the family unit. Assuming this to be true, this duty either arises out of the D.S.S./C.A.S. contract or out of the standard of care of profession of social work. Contractual negligence is arguably pleaded and/or is an issue on which sufficient notice to avoid prejudice has been given. However, the Martins were not in privity of contract with the Department of Social Services or C.A.S. without privity a claim could only be brought under intended beneficiary theories. The D.S.S./C.A.S. contract was not one where Mr. and Mrs. Martin were intended beneficiaries. If anyone, Ashley was such a person. However, even she does not qualify as an intended beneficiary under Michigan Law so as to give her standing to enforce the contract.

This leave as with only professional standards creating the duties allegedly admitted by defendants. At no time was this claim pleaded or noticed. As to plaintiff's assertion that this case should go forward on ordinary negligence not based on a statute, this claim is, also, rejected. First there is no such pleading. Secondly, this case has proceeded on claims of specific breaches of duties which are imposed, as noted earlier, either by professional standards or contract.

Regrettably, this case is dismissed and the plaintiffs are left with no relief.

4/24/97
DATE

/s/ Cynthia Diane Stephens
JUDGE CYNTHIA DIANE STEPHENS

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MICHAEL MARTIN and CYNTHIA MARTIN,

Plaintiffs,

-vs-

CHILDREN'S AID SOCIETY; BENNIE STOVAL, Director and Individually; DR. HERMAN SCHORNSTEIN; and CELIA B. CLAYTON, jointly and severally,

Defendants.

_____/

88-805900 CZ 3/10/88
JDG: CYNTHIA D. STEPHENS
MARTIN MICHAEL
VS
CHILDREN'S AID SOCIETY

SHERWIN SCHREIER (P20065) JAY B. SCHREIER (P38039) Attorney for Plaintiffs 21700 Northwestern Highway Suite 700, Tower 14 Southfield, MI 48075 (313) 552-1000

_____/

SECOND AMENDED COMPLAINT

PLAINTIFFS, by their attorneys, MEKLIR, SCHREIER, NOLISH & FRIEDMAN, P.C., state for their Second Amended Complaint:

1. Plaintiff MICHAEL MARTIN is the father of Ashley Martin. He is a resident of Detroit, Michigan.

2. Plaintiff CYNTHIA MARTIN is the mother of Ashley Martin. She is a resident of Detroit, Michigan. CYNTHIA MARTIN is married to MICHAEL MARTIN.

3. Defendant CHILDREN'S AID SOCIETY ("CAS") is a Michigan Corporation. Both its principal and its business office are located in Detroit, Michigan. CAS provides services to neglected/abused/problem children pursuant to its agreement with the Michigan Department of Social Services ("DSS").

4. HERMAN SCHORNSTEIN, M.D. is a physician licensed to practice in the State of Michigan and specializing in the practice of psychiatry.

5. CELIA CLAYTON is a foster care worker who was formerly employed by the CAS.

6. BENNIE STOVAL is and, at all times pertinent hereto, was the director of the CAS.

7. The amount in controversy is in excess of Ten Thousand ($10,000.00) Dollars exclusive of interest, costs and attorney feels.

GENERAL ALLEGATIONS

8. On September 6, 1984, Ashley Martin was born to CYNTHIA MARTIN and MICHAEL MARTIN at Bon Secours Hospital.

9. Plaintiffs MARTIN (and others) noticed that Ashley cried excessively. When this fact was brought to the attention of Ashley's pediatricians, it was attributed to either or both the overanxiousness of Plaintiffs MARTIN or colic.

10. On December 14, 1984, Plaintiffs MARTIN took Ashley to St. John's Hospital since she was running a fever of 102 degrees and her regular pediatrician was unavailable.

11. A routine x-ray of Ashley at St. John's Hospital revealed 13 fractures of the ribs in various stages of healing. Apparently the fractures had been sustained from around the time of Ashley's birth until approximately ten days before she [sic] presented at St. John's Hospital.

12. The examining physician suspected child abuse and contacted the DSS.

13. The DSS immediately filed an emergency petition with the Wayne County Probate Court for a temporary detaining order. The order was issued.

14. The DSS took custody of Ashley Martin and, shortly thereafter, transferred her to the CAS.

15. The CAS placed Ashley Martin with foster parents Dusama Beydoun and Loraine Beydoun. Upon information and belief, the Beydouns desired to adopt a white child.

16. Plaintiffs MARTIN were unable to explain the fractures but denied that they had harmed their daughter, Ashley.

17. On December 18, 1984, the DSS filed a neglect petition against Plaintiffs MARTIN in the Wayne County Probate Court.

18. A jury trial was held in January, 1986. At trial, Plaintiffs MARTIN presented medical evidence that Ashley may have had a medical disorder that made her susceptible to bone fractures.

19. The jury found that petitioner had proven by a preponderance of the evidence that Ashley should be made a temporary ward of the court.

20. Ashley remained in foster care and separated from Plaintiffs, under the direction and supervision of CAS, from December 19, 1984 until May 18, 1988.

COUNT I

21. Plaintiffs incorporate by reference the allegations of paragraphs 1-20, above, as if the same are fully set forth herein.

22. Both by statute and pursuant to contract with the DSS, the CAS is obligated to direct its activities toward the reintegration of a child into his/her family and the resolution of those problems which necessitated the original placement.

23. Defendants CAS, STOVAL and CLAYTON owed Plaintiffs the following duties:

(a) To encourage and support an ongoing relationship between Ashley and Plaintiff;

(b) To develop a working relationship with Plaintiffs which acknowledged their anger, anxiety and defensiveness relative to the foster care placement of Ashley;

(c) To advise and reassure Plaintiffs that priority is given to reuniting natural families;

(d) To identify and articulate barriers and problems inhibiting Ashley's return;

(e) To encourage and promote visitation and specific interaction between Plaintiff and Ashley;

(f) To develop realistic treatment and service plans the satisfaction of which would result in reunification of the family;

(g) To make appropriate referrals.

24. Defendants CAS, STOVAL, and CLAYTON were negligent and breached each of the above duties in the following ways:

(a) Attempted to discourage and destroy the relationship between Plaintiff and Ashley by curtailing visitation, allowing only supervised visitation in foreign environments, and permitting Ashley's foster parents to move approximately 300 miles away despite the obvious strain that such move would cause on the relationship between Ashley and Plaintiffs;

(b) Failed to develop a working relationship with Plaintiffs which addressed their steadfast position that they were innocent of the charges against them. Instead, Defendants created an antagonistic and adversarial situation by insisting that Plaintiffs confess to having abused Ashley as a precondition for Ashley's return;

(c) Acted to foster the relationship between Ashley and her foster parents while threatening Plaintiffs with permanent termination of their parental rights;

(d) Failed to identify problems with either Plaintiffs' child-rearing skills or their ability to interact with Ashley but, rather, steadfastly insisted that Plaintiffs confess to having abused Ashley as a precondition to her return although Plaintiffs persistently maintained their innocence;

(e) Discouraged and curtailed visitation between Plaintiffs and Ashley by curtailing the frequency of visitation, eliminating home visits, and allowing visitation only under strained conditions and in foreign settings;

(f) Failed to develop any treatment plans which were geared toward reunification of the family but, rather, designed "treatment" which was focused upon forcing Plaintiffs to confess to having abused Ashley. Defendants covertly and surreptitiously attempted to gather information supportive of their anticipated recommendation that Plaintiffs' parental rights be terminated and, further, participated in a conspiracy with Defendant SCHORNSTEIN intended to provide and produce information supportive of their recommendation that Plaintiffs' parental rights be terminated;

(g) Failed to refer Ashley to appropriate physicians for an evaluation, to consider the scholarly/medical opinions which confirmed Plaintiffs' claim that Ashley's injuries were a result of an underlying physical condition rather than child abuse, and failed to consider psychological evaluations of Plaintiffs which opined that they had not

abused Ashley and that there was no risk in returning Ashley to their custody.

25. The negligence and breaches of duty by Defendants CAS, CLAYTON and STOVAL has caused Plaintiffs anxiety, mental anguish, financial ruin and other damages.

COUNT II

26. Plaintiffs incorporate by reference the allegations of paragraphs 1-25, above, as if the same are fully set forth herein.

27. Pursuant to a March 15, 1982 Agreement (the "1982 Agreement") between the CAS and the DSS, the CAS is required to provide foster care and support services to neglected/abused/problem children such as Ashley Martin.

28. As part of its contractual obligations, the CAS entered into an individual Service Agreement (the "Individual Agreement") with the DSS relative to Ashley Martin.

29. Pursuant to the 1982 Agreement and the Individual Agreement, the CAS promised the DSS that it (through its agents and/or employees) would fulfill those duties outlined in paragraph 23 with respect to Plaintiffs.

30. As set forth in paragraph 24, the CAS by its agents and/or employees including, but not limited to, Defendants STOVAL and CLAYTON, breached those obligations which it was required to perform relative to Plaintiffs.

31. Plaintiffs were third-party beneficiaries of the 1982 Agreement and the Individual Agreement and suffered injury and damages as a result of Defendants' breaches of the same.

COUNT III

32. Plaintiffs incorporate by reference the allegations of paragraphs 1-31, above, as if the same are fully set forth herein.

33. Defendant SCHORNSTEIN evaluated Plaintiffs and Ashley in an attempt to determine the reasons for Plaintiffs' refusal to accept "responsibility" for the injuries to Ashley and the reasons why Plaintiffs' interactions with Ashley during supervised visitation allegedly had not been amenable to enhancement.

34. Defendant SCHORNSTEIN owed Plaintiffs a duty to fully consider their history and Ashley's history and to fairly evaluate the family interactions in good faith and with the goal of reunifying the family.

35. Defendant SCHORNSTEIN breached the duties which he owed Plaintiffs and was negligent and acted in bad faith in the following ways:

(a) Failed to adequately consider the medical evidence suggestive of a physical etiology for Ashley's injuries and thereby assumed that Plaintiffs were child abusers;

(b) Evaluated Plaintiffs interactions with Ashley as consistent with interactions of previous parents who abuse children rather

than as demonstrative of Plaintiffs' frustration over their wrongful contact with the child "welfare" system;

(c) Made recommendations regarding future interactions between Plaintiffs and Ashley not for the purpose of eventual reunification of the family but, rather, in bad faith and in conspiracy with Defendants CAS and CLAYTON for the purpose of further frustrating Plaintiffs' interactions with Ashley in the hope that support for permanent termination of Plaintiffs' parental rights would be acquired quicker.

36. Defendant SCHORNSTEIN's negligence, bad faith and conspiratorial acts has caused Plaintiffs anxiety, mental anguish and other damages.

WHEREFORE, Plaintiffs respectfully request that they be awarded damages from Defendants in an amount in excess of Ten Thousand ($10,000.00) Dollars along with interest and their costs and attorney fees.

Respectfully Submitted,

MEKLIR, SCHREIER
NOLISH & FRIEDMAN, P.C.

By: /s/ Jay B. Schreier
JAY B. SCHREIER
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Dated: Sept. 19, 1989
890904.003

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

MICHAEL MARTIN and
CYNTHIA MARTIN,

Plaintiffs,

-vs-

MARK HORTON, M.D.; JOSEPH FISCHOFF, M.D.; SHARON ANTCZAK; COUNSELING ASSOCIATES, INC.; ANDREA ZAK; KIM TRAVIS-EWING; MS. GREEN; WARREN SWIEHART; GLORIA FENISON; KATHY HART; and NORMAN NIGRO; jointly and severally,

Defendants.
_____/

59-705473 CZ 3/02/89
JDG: CYNTHIA D.
STEPHENS
MARTIN MICHAEL
VS
HORTON MARK MD

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SECOND AMENDED COMPLAINT

Plaintiffs, MICHAEL MARTIN and CYNTHIA MARTIN, by their attorneys, MIKLIR, SCHREIR, NOLISH & FRIEDMAN, P.C., state for their Second Amended Complaint against Defendants as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiffs MICHAEL MARTIN and CYNTHIA MARTIN, and their daughter Ashley Martin, are residents of the City of Detroit, County of Wayne, State of Michigan.

2. Defendant MARK HORTON, M.D. is a physician duly licensed to practice medicine in the state of Michigan and specializing in the practice of pediatric medicine. At all time pertinent hereto, Defendant HORTON was the duly authorized agent, servant and/or employee of the Children's Aid Society ("CAS"), which is located in the City of Detroit, County of Wayne, State of Michigan. Defendant HORTON treated and/or evaluated Plaintiffs and their daughter relative to his responsibilities with Children's Aid.

3. Defendant SHARON ANTCZAK is a psychiatrist and/or social worker who specializes and/or practices in the fields of psychology, social work and/or child abuse. At all times pertinent hereto, Defendant ANTCZAK was the duly authorized agent, servant and/or employee of Defendant Counseling Associates, Inc. ("Counseling Associates"), a Michigan corporation with its principal offices located in the City of Detroit, County of Wayne, State of Michigan. Defendant ANTCZAK treated and/or

evaluated Plaintiffs and their daughter relative to her responsibilities with Counseling Associates.

4. Defendant JOSEPH FISCHOFF, M.D. is a physician duly licensed to practice medicine in the State of Michigan. Defendant FISCHOFF specializes in the practice of psychiatry. At all times pertinent hereto, and with respect to his treatment and evaluation of Plaintiffs and Ashley Martin, Defendant FISCHOFF was the duly authorized agent, servant and/or employee of Counseling Associates and maintains offices in the City of Detroit, County of Wayne, State of Michigan.

5. At all times pertinent hereto, Defendants ANDREA ZAK and KIM TRAVIS-EWING (hereinafter the "CAS Defendants") were agents and/or employees of CHILDREN'S AID SOCIETY ("CAS") and each participated in the case involving Plaintiffs and their daughter.

6. At all times pertinent hereto, Defendants SUSAN PRIVETTE-GREEN, WARREN SWIEHART, GLORIA FENISON and KATHY HART (hereinafter the "DSS Defendants") were employees of the Wayne County Department of Social Services (the "DSS") and consulted with Defendants identified in the preceding paragraph with respect to the case involving Plaintiffs and their daughter.

7. Defendant NORMAN NIGRO is an attorney licensed to practice law in the State of Michigan and, at all times pertinent hereto, was the duly authorized agent, servant and/or employee of CAS.

8. The amount in controversy is in excess of Ten Thousand ($10,000.00) Dollars.

GENERAL ALLEGATIONS

9. On September 6, 1984, Ashley Martin was born to CYNTHIA and MICHAEL MARTIN at Bon Secours Hospital.

10. Subsequent to Ashley's birth, Plaintiff MARTINS took appropriate care of Ashley Martin including multiple contacts and consultations with and examinations by physicians.

11. On or about December 14, 1984, Plaintiffs took their daughter to St. John's Hospital for the reason that she was suffering from a fever. At St. John's Hospital, x-rays revealed that Ashley Martin had fractured ribs in various stages of healing as well as other potential fractures.

12. Subsequent to December 14, 1984, Plaintiffs were accused of child abuse and the Wayne County Department of Social Services took Ashley Martin away from Plaintiffs MARTINS and transferred her to CAS, which immediately placed Ashley Martin in foster care.

13. Ashley Martin remained in foster care and separated from Plaintiffs, under the direction and supervision of the CAS and the DSS and their agents and employees, from December 19, 1984 until May 18, 1988.

14. During the custody and child abuse proceedings which were pursued against Plaintiffs MARTINS and up and until the present, Plaintiffs denied that they ever inflicted abuse in any way, shape or form, upon Ashley Martin.

15. Throughout her stay in foster care, the DSS Defendants and the CAS Defendants were informed of

Plaintiffs belief that Ashley's injuries were the result of a congenital defect and received reports from competent medical doctors which supported their beliefs.

16. Although fully aware of Plaintiffs' belief and the medical support for the same, the DSS Defendants, the CAS Defendants and Defendant NIGRO insisted that Plaintiffs' [illegible] responsibility for Ashley's injuries as a precondition of her return to their custody.

17. During Ashley's stay in foster care, the DSS and its agents and employees required, supervised and approved CAS preparation of periodic plans and/or agreements which were intended to set forth goals to be achieved to facilitate Ashley's return to her parents.

18. The CAS and its agents and employees, including the CAS Defendants, with the approval and supervision of the DSS and its agents and employees, including the DSS Defendants, prepared a service plan and/or parent/agency agreement at approximately three month intervals between March, 1985 and November, 1988.

19. Up and until the December 1, 1987 Updated Service Plan, the CAS and its agents and employees (including the CAS Defendants), and the DSS and its agents and employees (including the DSS Defendants), prepared and approved service plans which preconditioned Ashley's return to Plaintiffs and/or increased visitation between Plaintiffs and Ashley on Plaintiffs' admission that they physically abused Ashley.

20. Except for the coercive requirements set forth in the preceding paragraph, the CAS and its agents and employees, including the CAS Defendants, and the DSS

and its agents and employees, including the DSS Defendants, failed to identify any goal-oriented activities for Plaintiffs to accomplish that would result in Ashley's return, failed to tell Plaintiffs what they needed to do to achieve unification and otherwise failed to see to promote Ashley's return to her parents.

21. Indeed, as early as March, 1985, the CAS Defendants, Defendant NIGRO, and the DSS Defendants first contemplated and agreed that Plaintiffs' parental rights should be terminated unless they confessed to abusing Ashley. The preparation of service plans and parent/agency agreement, referenced above, and other actions, set forth below, were supportive of parental termination rather than family reunification.

22. The DSS Defendants advised the CAS and its agents and employees, beginning in September, 1985 or before, that supervised home visits between Plaintiffs and Ashley should not be permitted and visitation should occur at the CAS playroom only.

23. As early as October, 1985, the DSS Defendants reiterated their objection to home visits between Plaintiffs and Ashley and explained that home visits would hurt a permanent custody petition.

24. In August, 1986 and thereafter, the CAS Defendants and other CAS agents and employees and the DSS Defendants allowed Ashley to remain with her foster parents although the foster parents were moving to an outcounty residence located approximately 150 miles from Detroit.

25. The DSS Defendants arranged for outcounty Social Services agencies to monitor Ashley's foster family and allowed Ashley to move with the foster family so as to promote the relationship between Ashley and her foster family to the detriment of Plaintiffs.

26. The DSS Defendants, CAS and the CAS Defendants refused and failed to arrange for Plaintiffs and Ashley to undergo joint psychiatric treatment/observation that would allow Plaintiffs to work toward the return of Ashley although the same had been advised by a psychologist from the Center for Child Study during the adjudicative and/or dispositional hearings held in January and February of 1986.

27. The DSS Defendants, Defendant NIGRO and the CAS Defendants sought to ensure that all action taken relative to Plaintiffs, even by outside consultants, were supportive of a permanent custody petition. For example, Defendant NIGRO and CAS, with the approval and/or assistance of the DSS Defendants, prevailed upon Herman Schornstein, M.D. to rescind his recommendation that Plaintiffs should have unsupervised visitation with Ashley, hired a medical doctor whom they understood would testify that Ashley did not suffer from a congential defect, and hired a psychologist, Defendant SHARON ANTCZAK, to evaluate Ashley's emotional disturbance which they attributed by history to her interactions with Plaintiffs.

28. CAS contacted Defendant ANTCZAK in early, 1987 and requested an evaluation of Ashley Martin's emotional state.

29. Defendant ANTCZAK obtained a history regarding Ashley's problems from Ashley's foster mother and Celia Clayton. Plaintiffs never were interviewed.

30. Both Defendant FISCHOFF and Celia Clayton advised Defendant ANTCZAK that Plaintiffs' parental rights would be terminated in the near future.

31. After consulting with Defendant FISCHOFF after her evaluation of Ashley, Defendant ANTCZAK recommended a termination of Plaintiffs' visitation rights.

32. Defendant ANTCZAK did not recommend joint therapy with Ashley and Plaintiffs or make any recommendations regarding Plaintiffs due to her understanding that Plaintiffs' parental rights soon would be terminated.

33. Defendant ANTCZAK agreed that joint therapy should be recommended if a conflict develops between a child and the natural parents and the natural parent's visitations rights are to continue.

34. Although Defendant FISCHOFF was aware that the DSS, the CAS and this Probate Court sought to obtain a confession from Plaintiffs as a result of his testimony, in response to a hypothetical question, that a child (such as Ashley) would be at risk for reabuse absent an admission of responsibility for the injuries by the parents (such as Plaintiffs), he refused a request in June, 1987, from Plaintiffs' psychotherapist, that he evaluate Plaintiffs and reassess his position.

35. Beginning in December, 1986 and thereafter, Plaintiffs were advised that a petition to terminate their parental rights would be filed.

36. In fact, no such petition was ever filed.

37. In reliance on Defendant ANTCZAK's biased and negligent conclusion that Plaintiffs' visitation rights with Ashley should be terminated, CAS, at the direction and/or with the approval of the DSS Defendants, advised Plaintiffs in July, 1987 that their visits with Ashley were reduced from weekly to biweekly.

38. Defendant HORTON, in his capacity as an agent and servant of Children's Aid, worked in conjunction with and in concert with Defendants ZAK, TRAVIS-EWING and NIGRO to achieve a result that would illegally, unlawfully and without a basis in law or fact terminate the parental relationship between Plaintiffs MARTINS and Ashley Martin when he knew or should have known through the exercise of reasonable conduct and judgment that said action was improper.

COUNT I

39. Plaintiffs incorporate by reference the allegations of paragraphs 1-38, above, as if the same are fully set forth herein.

40. Both by statute and pursuant to contract with the DSS, the CAS and its agents is/are obligated to direct their activities toward the reintegration of a child into his/her family and the resolution of those problems which necessitated the original placement.

41. Defendants ZAK, TRAVIS-EWIN, NIGRO and HORTON owed Plaintiffs the following duties:

(a) To encourage and support an ongoing relationship between Ashley and Plaintiffs;

(b) To develop a working relationship with Plaintiffs which acknowledged their anger, anxiety and defensiveness relative to the foster care placement of Ashley;

(c) to advise and reassure Plaintiffs that priority is given to reuniting natural families;

(d) to identify and articulate barriers and problems inhibiting Ashley's return;

(e) To encourage and promote visitation and specific interaction between Plaintiff and Ashley;

(f) To develop realistic treatment and service plans the satisfaction of which would result in reunification of the family;

(g) To make appropriate referrals.

42. Defendants ZAK, TRAVIS-EWING, NIGRO and HORTON, were negligent, breached each of the above duties and acted in bad faith in the following ways:

(a) Attempted to discourage and destroy the relationship between Plaintiff and Ashley by curtailing visitation, allowing only supervised visitation in foreign environments, and permitting Ashley's foster parents to move approximately 150 miles away despite the obvious strain that such move would cause on the relationship between Ashley and Plaintiffs;

(b) Failed to develop a working relationship with Plaintiffs which addressed their steadfast position that they were innocent of the charges against them. Instead, Defendants created an antagonistic and adversarial situation by insisting that Plaintiffs confess to

having abused Ashley as a precondition for Ashley's return;

(c) Acted to foster the relationship between Ashley and her foster parents while threatening Plaintiffs with permanent termination of their parental rights;

(d) Failed to identify problems with either Plaintiffs' child-rearing skills or their ability to interact with Ashley but, rather, steadfastly insisted that Plaintiffs confess to having abused Ashley as a precondition to her return although Plaintiffs persistently maintained their innocence;

(e) Discouraged and curtailed visitation between Plaintiffs and Ashley by curtailing the frequency of visitation, eliminating home visits, and allowing visitation only under strained conditions and in foreign settings;

(f) Failed to develop any treatment plans which were geared toward reunification of the family but, rather, designed "treatment" which was focused upon forcing Plaintiffs to confess to having abused Ashley. Defendants covertly and surreptitiously attempted to gather information supportive of their anticipated recommendation that Plaintiffs' parental rights be terminated and, further, participated in a conspiracy with HERMAN SCHORNSTEIN, M.D., Defendants ANTCZAK and FISCHOFF intended to provide and produce information supportive of their recommendation that Plaintiffs' parental rights be terminated;

(g) Failed to refer Ashley to appropriate physicians for an evaluation, to consider the scholarly/medical opinions which confirmed a result of an underlying physical condition rather than child abuse, and failed to consider psychological evaluations of Plaintiffs which opined that they had not abused Ashley and that there was no risk in returning Ashley to their custody. Rather, these Defendants sought out and conspired with psychologists/psychiatrists such as Defendants ANTCZAK and FISCHOFF to gather information supportive of their plans to petition for the termination of Plaintiffs' parental rights.

43. The negligence and breaches of duty by Defendants ZAK, TRAVIS-EWING, NIGRO and HORTON has caused Plaintiffs anxiety, mental anguish, financial ruin and other damages.

COUNT II

44. Plaintiffs incorporate by reference the allegations of paragraphs 1-43, above, as if the same are fully set forth herein.

45. By statute (MCL 408.18C), and pursuant to contract with CAS, pursuant to its service manual, and pursuant to federal law (42 USC 601), the DSS Defendants were obligated to direct their foster care services relative to Plaintiffs toward the reintegration of Ashley into her family have and the resolution of those problems which necessitated the original placement.

46. Defendants GREEN, SWIEHART, FENISON and HART owed Plaintiffs the following duties:

(a) To review and analyze the CAS' activities with respect to Plaintiffs and Ashley Martin to ensure that the CAS complied with its obligations under the 1982 Agreement;

(b) To ensure that the CAS was providing appropriate service to Plaintiffs and to Ashley Martin;

(c) To develop in conjunction with the CAS a service plan for Plaintiffs and Ashley Martin.

(d) To promote Ashley's return to her parents;

(e) To establish and supervise the establishment of goal-oriented activities, the satisfaction of which would result in Ashley's return;

(f) To establish and supervise the establishment and description of those activities required of Plaintiffs as a precondition of Ashley's return; and

(g) To project a likely date for Ashley's return.

47. Defendants GREEN, SWIEHART, FENISON and HART breached each of the above duties and acted in bad faith with respect to the same in the following ways:

(a) Failed to appropriately review and analyze the CAS' activities with respect to Plaintiffs and Ashley Martin and allowed the CAS and its agents and employees to commit those breaches outlined in paragraph 42 above, for more than three years;

(b) Allowed and consented to the provision of inadequate service to Plaintiffs and to Ashley Martin which service was geared toward the gathering of information supportive of an anticipated petition to terminate Plaintiffs' parental rights rather than toward the reunification of the family; and

(e) Developed service plans which curtailed Plaintiffs' visitation which Ashley and allowed visitation only under strained conditions and in foreign settings;

(d) Prohibited Plaintiffs from visiting Ashley outside of the agency setting although lacking a justifiable basis or a court order for doing so;

(e) Decided that Plaintiffs' parental rights should be terminated and then geared their handling of Plaintiffs toward gathering information supportive of a petition for permanent custody;

(f) Allowed Ashley to be moved to a location 150 miles from Detroit;

(g) Authorized the retention of only those experts who would likely testify in favor of termination of Plaintiffs' parental rights;

(h) Refused to arrange for joint therapy between Ashley and Plaintiffs although the Center for Child Study suggested that the same be accomplished;

(i) Insisted that Plaintiffs confess to abusing Ashley as a precondition to her return to them although aware of Plaintiffs' persistent refusal to so confess.

48. The negligence, breaches of duty and bad faith actions by Defendants GREEN, SWIEHART, FENISON and HART has caused Plaintiffs anxiety, mental anguish, financial ruin and other damages.

COUNT III

49. Plaintiffs incorporate by reference the allegations of paragraphs 1-48, above, as if the same were fully set forth herein.

50. Plaintiffs MARTIN's right to the custody of Ashley Martin is a liberty interest guaranteed by the Michigan Constitution, Const 1963, Art 1, § 17, and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

51. Defendants GREEN, SWIEHART, FENISON and HART, individually, by their actions set forth in paragraph 47, above, and in conspiracy with the CAS, the CAS Defendants, and with Herman Schornstein, M.D., Joseph Fischoff, M.D. and Sharon Antczak, violated Plaintiffs' Constitutional rights and under color of law deprived Plaintiffs of their right to the custody of Ashley as follows:

(a) Allowed Ashley's foster parents to move with Ashley 150 miles away from Detroit although such move further strained Plaintiffs' relationship with Ashley, caused emotional distress to Ashley and occurred without notice to Plaintiffs and without a proper hearing;

(b) Decreased Plaintiffs' visitation rights with Ashley without a proper hearing and based

upon a one-sided, negligent evaluation that was infirm as a result of the biased history presented to Defendant ANTCZAK;

(c) Failed to establish goal-oriented activities for Plaintiffs to achieve and failed to identify the specific actions which Plaintiffs were required to take, aside from admitting responsibility for Ashley's injuries, which would result in Ashley's return to Plaintiffs. Defendants; steadfast insistence that Plaintiffs admit responsibility for Ashley's injuries as the only activity which would result in the reunification of the family established an adversarial relation between Plaintiffs and Defendants which led Defendants to convey to the Court an irrebuttable presumption that Plaintiffs were unfit parents;

(d) Failed to afford Plaintiffs the opportunity, such as through home visits or joint therapy with Ashley, to obtain evidence to present to the Court to establish that they were fit to regain custody of Ashley;

(e) Sought to permanently deprive Plaintiffs of custody of Ashley through those actions set forth above and by failing to file a petition for permanent custody due to their concern that the State's proofs would be insufficient to satisfy the burden of proof at a termination proceeding;

(f) Failed to present any evidence at the dispositional hearings that indicated that Plaintiffs would be abusive to Ashley but still insisted that Plaintiffs should not regain custody of Ashley;

(g) Relied on, obtained and used as a basis for their plans and goals the opinions of outside consultants, such as Defendant ANTCZAK, that were formulated without adequate history and based on biased information.

52. Defendants' actions set forth in paragraphs 47 and 51 above, deprive Plaintiffs of their constitutional rights and entitle Plaintiffs to recover their attorney fees and actual and/or punitive/treble damages under 42 USC 1983.

WHEREFORE, Plaintiffs pray that the trier of fact award them their actual damages, punitive and/or treble damages and their actual costs and attorney fees.

Respectfully Submitted,

MEKLIR, SCHREIER
NOLISH & FRIEDMAN, P.C.

By: /s/ Jay B. Schreier
JAY B. SCHREIER (P38039)
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Dated:
900212.001

(LOGO) MICHIGAN DEPARTMENT OF SOCIAL SERVICES

SERVICES MANUAL
CHILDREN AND YOUTH

ITEM 722 PAGE 39

PROGRAM FOSTER CARE

DATE Rev. 11-6-89 Eff. 12-11-89 SM 89-8

PARENT-AGENCY TREATMENT PLAN AND SERVICE AGREEMENT
(for Temporary Wards)

Child(ren) Name: _____ Date of Birth: _____

PERMANENCY PLANNING GOAL

Identify revised or continued permanency planning goal based upon SM Item 722, Permanency Planning Goals. Include time frame (month/year) for achievement.

If the goal is PFFA or Custodial Care add the following:

1. Statement of the special need or circumstances that require this goal and not return home or placement with relative.

2. Statement of the efforts that were made to place the child with the family or with relative.

ACTIVITIES NECESSARY TO ACHIEVE THE PERMANENCY PLANNING GOAL

1. Parental Activities

    a. List each goal for parent, specific action steps, time frame for achieving and expected outcome.

b. Specify frequency, location and duration of parent-child visits. If less than weekly specify why. If agency is limiting visits, specify why more frequent would be harmful to the child and what parent must do to achieve at least weekly visitations. If parent is limiting, indicate parents reasons for wanting less frequent visits and project if and when frequency could be increased. If location is other than parental home, specify where and what conditions must exist for in-home visits to take place. If visit is supervised, specify by whom and what conditions must exist for unsupervised visit. Specify length of visit. Identify what the agency will do to facilitate parent-child visitation under worker activities and what the parent must do here.

2. Worker Activities

a. State those activities, in support of the services offered, that the worker will do to assist the parent(s) in their efforts to achieve reunification.

b. State assurances of proper care and services by the worker to the child(ren) in foster care.

c. State the frequency of parental and worker visitation to achieve the objectives. State the frequency of visitation with child and foster parents. State frequency of visitations between child and siblings.

d. Identify services to be provided to the parent(s), the child and to foster parents.

3. Child-Centered Activities

a. Child's goals and action steps (include time frames and responsibility). Goals should address: Social Services, Education, Health, Vocational training, and Mental Health Services. Identify

what agency will provide services and what the parent(s) and foster parents need to do to meet these specific needs.

b. For each ward age 16 or older (including those wards who become 16 years of age during the report period), include a description of the programs and services which will assist the youth prepare for transition to a state of functional independence or the ability to take care of oneself socially, economically and psychologically and identify where, how and by whom these services and programs are to be provided.

By signing below I agree that I have read the above, discussed it with my worker, and understand what is expected of me to enable my child(ren) to be returned home.

Mother's Signature	Date	Father's Signature	Date

By signing below on behalf of the Department of Social Services we agree to those activities outlined above and will assist the family in their efforts to regain custody of their children.

Case Worker's Signature	Date	Supervisor's Signature	Date

Distribution of Plan:
(Purchase Care Only) ___ DSS Office Date Sent ____

Local or Office Approval (Purchase Care Only)

Signature_____ Title_____ Date_____

PARENT/CHILD VISITATION

The parent/child tie has deep emotional significance for both parent and child. Visitation is one of the methods agencies *must* use to maintain and strengthen this relationship. By facilitating *weekly* parent/child visitation, agency staff can positively influence the length of time children stay in the foster care system and how quickly the goal of performance can be achieved.

Public Act 224, 1988 requires visitations between parent and child no less than every seven days after the dispositional hearing, unless clearly documented as harmful to the child. However, the frequency or visitations prior to the dispositional hearing is an important indicator of how quickly children can be reunited with their families, when this is the plan. Therefore, the more *frequent* the visitation, the more likely the child will return home. At the initial dispositional and subsequent review hearing, the Court will review the visitation plan and may order revised visitations for the family.

Weekly visits between the parent and child in out-of-home placement are encouraged and facilitated as necessary by the agency. Out-of-home placements include *relative* placements, foster family

homes, foster family group homes, and child caring institutions. Only if the visit, even if supervised, would be harmful to the child or there are other reasons acceptable to the Court, can visitation be less frequent or not occur. The location, length and frequency of visits, as well as the action steps for achieving the visitation standard must be part of the Parent/Agency Treatment and Service Plan and documented in the Initial Service Plan and Updated Service Plan. In planning for parent/child visits, consideration must also be given to visitation with the non-custodial parent. Foster care staff are to utilize the following criteria in developing a visitation plan with the parent(s):

1. The standard for visitation scheduling when the plan is to return the child home is to increase visits in length and to allow unsupervised visits in the parental home.

2. A child and parent are to be offered a visit within the first week of placement and at least weekly thereafter. If the child is very young, visits may need to be even more frequent.

3. At the time a child is placed in a foster care setting, the agency worker is to discuss

with the parents the critical importance of visiting with the child. The worker is also to discuss with the parents the likely positive and negative consequences of the visit and that visits are good indicators of an early reunification of the family unit.

4. The factors (i.e., the situations of parents, the agency, the foster home, the safety of the child) that might affect the visits must be identified and evaluated. Issues pertaining to a schedule of visits should be discussed with the parent(s) and an agreement reached as to a visitation schedule. Scheduling of visits must be done with primary consideration for the parents' time commitment. Barriers to visitation are to be identified, and where possible, resolved. The visitation plan will be reviewed by the Court and may be subject to change by a Court Order.

5. Parents must not be prevented from visiting their children because they are unable to pay for necessary transportation. Volunteers, if available, can be used to provide transportation

to visits. Funds for transportation, i.e., reimbursement to a foster parent who transports a child to visits by increasing their daily per diem rate and/or via DSS-634, are available to help foster parents with the expense of facilitating visits between birth parents and their children in foster care. (See SM Item 902. Transportation for Youth In Care.)

GRANDPARENT/ CHILD VISITATION

P.A. 340 and 341 of 1982, allow for grandparent/child visitation orders to be entered under two circumstances: A circuit court may enter such an order as a result of a custody dispute unrelated to the reason the child came into foster care. A juvenile court may enter a visitation order in stepparent adoptions.

In addition to honoring court ordered grandparent visitation of children in foster care, foster care workers are to also carefully consider all requests from grandparents for visitation and honor such if they are considered to be in the best interests of the child.

* * *

Emergency Institutional Placements for Pre-Ten Year Olds (Cont'd)	to the Director of the Office of Children and Youth Services. If verbal approval for placement is given, the written documentation required above must be submitted to OCYS within the thirty (30) day exception period. This does not apply to shelter placements.
Waiver Extension Request	Waiver extension requests must be submitted to OCYS prior to the expiration of the previously granted waiver. Waiver extension requests must include a cover memo outlining the reasons more time is required to achieve the treatment objectives. This request should be supported by attaching copies of the most recent Updated Service Plans from the residential provider. A waiver extension may be granted for a period not to exceed six (6) months. There is no provision for any type of extension for institutional shelter care. Placements in an institutional shelter care facility must be limited to thirty (30) days.
PREPARATION FOR RETURN HOME	Once it has been determined that the presenting problem has been alleviated so that return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health or mental well-being, the foster care worker should begin a planned process to reunite the family.

Staff are to be sensitive to the relationship that has developed between the child and foster parent(s). Whenever it is possible and constructive, means for continuing some relationship are to be developed.

For children returning to their own family, parents shall receive help and support in making necessary readjustments in family living patterns. Service to the family shall continue until those problems that brought about placement have been resolved to the point of not threatening another disruption.

Worker Responsibility

Prior to returning a child to the home from which removed or to the home of the other parent, the foster care worker is to:

Determine the motivation and capability of the parent(s) or legal guardian to have the child returned.

Provide documentation that appropriate rehabilitative/remedial services have been consistently provided to the parent(s) (or other relevant adults in the home) and child to minimize the potential for further abuse or neglect and that the presenting problem(s) causing removal has been resolved.

Collateral resources are to be utilized in helping the worker

	arrive at a decision to return the child home. Documentation of collateral contact results is to be entered on the updated service plan. Include a statement in the updated service plan that a decision to return the child home has been reviewed and agreed upon by the supervisor.
Visitation	Gradually increase the amount of visitation with parent(s), custodian(s), or guardian(s), including overnight and weekend visits. Increased visitation will help ease the transition from foster care to another living arrangement. Monitor and document the results of increased visitation to aid in determining the projected timing and success of the child returning home.
Service Planning	Develop/renegotiate the Parent/Agency Treatment Plan and Service Agreement portion of the service plan. Outline in concrete, behaviorally specific terms what can reasonably be expected of the parent(s), custodian(s) or guardian(s), and of the child to maintain placement in the child's own home.

Agreements are to be goal directed and time limited.

Post placement services are to be negotiated in a Parent/Agency Treatment Plan and Service Agreement following the child's return home. It is to be renegotiated to reflect unmet goals, updated goals, how goal attainment will be accomplished, and the time frames needed to reach goal attainment and case closure. Post placement services are not to continue beyond ninety days without documented supervisory approval and/or through a juvenile court mandate.

Foster care workers are to provide intensive services to the family through weekly in-person contacts with the parents during the first month of post placement services. This period of weekly contact may be extended to ninety days, if necessary, but in no instance, subsequent to the first thirty days, can in-person visits be less than twice monthly.

Community Resources	Develop/reinforce/reestablish a community support system. Prior to the return of the child, the foster care worker is to be involved in establishing community support systems where none have previously existed and/or in reinforcing the systems that do exist. When the decision has been made to return the child, the worker shall also provide for support systems for the child, e.g., prevention services, educational services, day care, employment services, recreational services, etc.
Criminal Records Check	Criminal records checks can be very useful in assessing the potential risk for abuse to a child by their parent or by a significant adult such as living-together partners. Criminal records checks from local law enforcement agencies may be requested in those instances where factors present in the case lead the worker and/or their supervisor to become concerned that information regarding criminal convictions would be helpful in case planning. Local offices are encouraged to develop working relationships locally to obtain information regarding criminal convictions.

POST PLACEMENT DICTATION

The following information shall be documented within 30 calendar days of foster care termination, or if the child is returned to this home, as required by Child Placing Agency Rule 281 and may be incorporated in an updated service plan:

1. Reason for termination:

2. Location of child:

3. Summary of services provided during care:

4. Assessment of child's needs and the parent(s) needs still to be met.

5. A statement that the termination has been explained to:

   a. The child in a manner consistent with his/her capacity to understand.

   b. The parent(s), the foster parents, the referring agency, and the person(s) assuming custody of the child.

6. Provision for follow-up services.

7. A summary explaining circumstances if an unplanned termination.

8. Medical information must be given to the parents at this time as indicated in Licensing Rule 267.

FOSTER CARE/ ADOPTION

Within 10 working days of permanent wardship of children currently supervised by the Department, the foster care worker is to make a referral to the MDSS adoption supervisor responsible for providing adoption services to the county for purpose of a permanency planning review. This referral shall consist of the most recent Initial or Updated Service Plan completed following permanent wardship. In those instances where the Department has just assumed responsibility for a permanent ward, the foster care worker is to make a referral to the MDSS adoption supervisor within 10 working days of the Initial Service Plan. It is recognized that appeal periods may delay an adoptive placement. However, referral to the MDSS adoption supervisor is not to be delayed pending appeal.

(2)

Supreme Court, U.S.
FILED
NOV 25 1997
CLERK

No. 97-543

In The

Supreme Court of the United States

October Term, 1997

MICHAEL MARTIN and CYNTHIA MARTIN,

Petitioners,

vs.

MARK HORTON, *et al.*, jointly and severally,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

BRIEF IN OPPOSITION FOR RESPONDENTS CAS

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3888

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APPENDIX

Appendix A — Order Of The Court Of Appeals For The State Of Michigan Dated March 29, 1996 ..... 1a

STATEMENT OF THE CASE

A. Introduction

Petitioners Michael Martin and Cynthia Martin seek to transform their negligence suit against Respondent Children's Aid Society (hereinafter "CAS") into a claim under 42 U.S.C. § 1983 which was never alleged, pursued or appealed. The claim was not even mentioned until very close to the end of the state appellate process.

In their Petition, the Martins essentially contest — but never mention — the March 29, 1996 refusal of the Michigan Court of Appeals to allow their negligence case against private social workers to be reinvented as a 42 U.S.C. § 1983 cause of action simply for appellate enhancement.

The complex procedural history of this case, recited below, is born of the Petitioners' attempts over a decade to cast and recast their action into whatever form necessary to pursue a civil remedy against virtually every organization, private person, or public official that implemented the Michigan Probate Court's directive following the unanimous finding of a jury in January of 1986 that Petitioners abused their daughter. The finding of abuse has never been disturbed.

B. The Abuse Proceedings

On December 18, 1984, a medical examination of Ashley Martin, then 13 weeks old, revealed numerous broken ribs, possibly as many as 18, in various stages of healing, fractures of both femurs, a bruise on the lower back and a bruise on the left leg. Ashley was placed in a foster home pursuant to the jurisdiction of the Wayne County Michigan Probate Court Juvenile Division.

Mich. Comp. Laws § 712A.2 creates the juvenile division of the probate court and charges it with broad jurisdiction, including protecting the child in case of parental abuse. § 712A.2(b). The probate court has jurisdiction to obtain custody of the child pending a hearing, detain and place the child in a foster home, and receive advice from agencies as to placement of children. §§ 712A.15, 712A.16, 712A.18. It also requires that the probate court receive service plans as to further handling of the child's case from an agency, § 712A.18(f)(2)(3), and requires that review hearings and supplemental orders of disposition be made. § 712A.19. The probate court is required to conduct permanency planning hearings every 364 days if the child remains in foster care and parental rights have not been terminated. § 712A.19a.

After Ashley's placement in a foster home, the Michigan Department of Social Services (hereinafter "DSS") filed a petition seeking to have Ashley made a ward of the court. In January of 1986, a jury trial was held in the Wayne County Probate Court relative to the DSS abuse allegations. The unanimous decision of the jury was that Ashley had been abused. Ashley was accordingly made a temporary ward of the court.

Over the next three years, the probate judges of Wayne County conducted numerous hearings and continued the temporary foster care of Ashley Martin. Following the finding of abuse, the probate court set certain conditions which had to be met before the child could be returned to her natural parents. One of those conditions was that the natural parents accept responsibility for the injuries sustained by Ashley. The Petitioners refused to accept such responsibility then and to this day. The abuse proceedings remained at a standstill for over two years as a result of their refusal.

Pursuant to statute and probate court orders, the DSS had legal responsibility for Ashley. DSS frequently carries out its

duties in these cases by contracting with private organizations to provide the primary case services. CAS is a non-profit child care organization, licensed by the State of Michigan. Pursuant to contract, CAS works with the DSS and the court to render primary case services to abused children. CAS arranges temporary foster care, undertakes to reintegrate the child into the family, prepares treatment plans for the child and the family, and provides court testimony, recommendations, and reports to the court upon request by the court or the DSS. The CAS activities are an integral part of the probate court's statutory duties and powers. In Ashley's case, Respondents, CAS and its individual employees Zak, Travis-Ewing, Clayton and Stoval (hereinafter "CAS Defendants"), performed these primary case services.

Dr. Bennie Stoval is the Director of CAS. It is solely by virtue of this position that she is a party to this suit, although Petitioners have sued her both as the Director and individually. Celia Clayton, Andrea Zak and Kim Travis-Ewing were three case workers employed by CAS who were assigned to the Ashley Martin case.

The Petitioners appealed the January 1986 finding of abuse by the probate court jury and the subsequent continued placement of Ashley in foster care. The appellate process and the probate proceedings relative to continued temporary foster care proceeded contemporaneously in the following two years.

On April 5, 1988, the Michigan Court of Appeals affirmed the abuse finding of the jury, but found that the Wayne County Probate Court had been too rigid in its insistence that the Petitioners admit responsibility for Ashley's injuries as a condition of her return to their custody. *Matter of Martin*, 167 Mich. App. 715, 423 N.W. 2d 327 (1988). CAS and the individual Respondents then fully carried out their duties, as directed by

the court of appeals, the probate court, and DSS to return and integrate Ashley into the Petitioners' family.

C. Civil Proceedings

The procedural history of this case is extensive, involving review of — at a minimum — four separate lawsuits, at least eight different complaints or amended complaints, eight dispositive motions, seven docketed appellate proceedings and more than twenty litigants, each with their own unique set of facts and law.

A fully annotated procedural history is contained at two points in the record below, namely the Appellees' Brief and Cross-Appellants' Brief filed March 24, 1994 in the Michigan Court of Appeals, together with its Appendix, Volumes I-III, (hereinafter "Appeal App."). Additional factual and procedural history is contained in pages one through thirty-nine of Defendants-Appellees' Brief in Opposition to Appellants' Application for Leave to Appeal in the Michigan Supreme Court, and accompanying Addendum (hereinafter "Add.").

However detailed the procedural odyssey of the litigants in this case, two simple truths emerge from a review of the record. First, the lengthy procedural history of this case essentially involves Petitioners' attempts to remanufacture their claims in order to survive the various motions of Respondents and others requiring a plain statement of Petitioners' basis for liability. Second, despite these efforts by Respondents and others which essentially afforded Petitioners every opportunity to raise a § 1983 claim against CAS or any CAS Defendant in the trial court, Petitioners did not do so until their Motion for Rehearing in the Michigan Court of Appeals on February 2, 1996.

Petitioners' omission of a § 1983 claim against the CAS

Defendants was deliberate. In fact, before this action was initiated, on November 16, 1987, Petitioners brought a § 1983 action against certain CAS Defendants and others in federal court. The case was quickly and voluntarily dismissed by Petitioners on November 29, 1987. Contrary to representations of the Petitioners to this Court, the § 1983 claim was never again pled against Respondents.

On March 10, 1988, the Petitioners filed a Complaint in Wayne County Circuit Court, naming Respondents CAS, Stoval, Clayton, the DSS and several of their employees as Defendants (hereinafter "1988 case"). The 1988 case contained no 1983 claim. (Appeal App. 8.)

On March 2, 1989, the Petitioners filed a second action in the Wayne County Circuit Court (hereinafter "1989 case"). As time went on, more persons had become involved with the probate court proceeding and, consequently, Petitioners joined more litigants. Originally, the 1989 case contained no § 1983 claim. (Appeal App. 10.)

The factual basis for both the 1988 and 1989 cases (as well as the federal suit) was that the Defendants had implemented the probate court directive that the Petitioners accept responsibility for Ashley's injuries.

On May 1, 1989, the CAS, Stoval, and Clayton filed a Motion for Summary Disposition in the 1988 case. The Defendants sought dismissal under the common law doctrine of absolute judicial immunity.

On July 14, 1989, the circuit court judge ruled that most of the CAS conduct alleged in the Complaint was "integrally involved in the judicial process and relative to that investigation and decision making process" and thus subject to the protection of judicial immunity. However, the court questioned whether

all actions of the CAS were so protected. Petitioners' counsel then suggested that, in light of the motions filed thus far and the rulings made by the court, a new pleading was needed "to set forth the facts and claims more specifically." (Appeal App. 14, at 23.)

Subsequently, additional confusion developed as to exactly which claims remained against the CAS Defendants, and on September 18, 1989, the Petitioners sought leave to amend the 1988 Complaint. In their formal motion for leave, Petitioners' counsel stated:

> Admittedly, Plaintiffs' Complaint and First Amended Complaint could be construed (or misconstrued) to inartfully state a myriad of vaguely-asserted legal theories: constitutional deprivations under 42 USC 1983 and 42 USC 1985; negligence; third-party contractual beneficiary and intentional infliction of emotional distress. The proposed Second Amended Complaint eliminates some of these theories while specifying and detailing the breaches of duty and contract which Plaintiffs assert subject Defendants to liability.

(Appeal App. 15, at 5.)

Petitioners' motion for leave to amend was granted and, on September 19, 1989, Petitioners filed their Second Amended Complaint in the 1988 cases, alleging only negligence due to the breaches of duty and contract Petitioners had referenced in the above statement. Also, consistent with that statement, § 1983 was neither pled nor mentioned.

The Petitioners also sought leave to amend the 1989 Complaint on February 14, 1990. Subsequently, additional individual motions for summary disposition and consolidation

ensued, and the court delayed ruling on Petitioners' motion for leave to amend.

On February 22, 1991, the circuit court held a hearing on numerous pending motions for both the 1988 and 1989 cases. Applying Michigan law, the court ruled that none of the Defendants were entitled to absolute judicial immunity, that all of the Defendants were entitled to qualified immunity, that the Defendants' qualified immunity could be defeated only by proof of bad faith, and that the undisputed facts showed no bad faith on the part of DSS Defendants, Swiehart, Green, or Hart. DSS' Motion for Summary Disposition was accordingly granted.

The court also ruled that because there were questions of fact as to the bad faith of the CAS Defendants, the actions of the CAS Defendants might not be protected by qualified immunity. By Order dated March 14, 1991, the Motions for Summary Disposition of the CAS Defendants were denied. A similar motion by Dr. Schornstein, a doctor who had examined Ashley at the request of the probate court, was also denied. The court also granted the Petitioners' 1989 case Motion for Leave to File Second Amended Complaint, and ruled that the 1988 and 1989 cases were consolidated for all subsequent proceedings.

CAS and Dr. Schornstein separately appealed the March 14th orders denying their Motions for Summary Disposition. The CAS appeal was refused, but a different panel of the Michigan Court of Appeals granted Dr. Schornstein leave to appeal. By Order dated October 17, 1991 Dr. Schornstein's case was remanded with instructions relative to immunity of witnesses. Dr. Schornstein and Respondents both renewed their dispositive motions based on the ruling.

On January 10, 1992, the trial court granted Dr.

Schornstein's motion and denied Respondents' motion. During oral argument on these motions, Petitioners defined their claim as one in negligence. Section 1983 was not mentioned.

Also on January 10, 1992, Respondents filed a Motion in Limine. (Appeal App. 46.) The Respondents protested that the Petitioners had never disclosed the specific origins of Respondents' alleged duty to the Petitioners. Respondents challenged Petitioners to define *any* statutory or other duty. The Petitioners' February 18, 1992 Response to the Motion in Limine did not even mention § 1983. (Appeal App. 47, at 6.) The following day, Respondents filed a Reply to the Petitioners' Response to the Motion in Limine reiterating that Respondents had been unable to ascertain any legal basis for the duties generally alleged by the Petitioners in the Second Amended Complaint.

On February 21, 1992, the circuit court held a hearing on the Respondents' Motion in Limine. At the hearing, the Petitioners' counsel again asserted that Petitioners' claim was for negligence based on a breach of contractual duty pursuant to service plans and a statutory duty pursuant to a yet unspecified state statute:

> THE COURT:
>
> [O]kay, anything else?
>
> MR. SCHREIER [The Petitioners counsel]:
>
> Only that we did not address duty because as the updated service plans as well as case law as well as statutes make abundantly clear, the responsibility of the social worker was to attempt to unify the family, and all social workers including Miss Clayton, who

> we focus our attack upon if you will, indicate that there are a number of steps that we need to take with the Martins. . . .
>
> MR. KEATING [Respondents' counsel]:
>
> [I]t's not up to the defendants, your Honor, to create a duty for the plaintiffs in this case. We have perused the statute. If I can review the statute, the statute says that the purposes of the statute are to take such actions as will be conducive to the child's welfare and the best interest of the state. . . .

(Appeal App. 49, at 14-16.)

> MR. KEATING:
>
> [T]hat's going to be an issue of law, though, Judge. Duty is an issue of law.
>
> THE COURT:
>
> I've got that, Counsel. And until somebody gives me the Jury instructions which should include the statutes, I can't rule on that and I'm not going to. . . .

(Appeal App. 49, at 22.)

Respondents submitted a proposed order relating to the court's ruling and Petitioners objected. On March 24, 1992, the trial court held a hearing to resolve objections to the order, decide jury instructions, and settle pre-trial order disputes. As promised in February, the court revisited the issue of Respondents' alleged duty to the Petitioners. Petitioners' counsel unequivocally stated that Petitioners claim sounded only in ordinary negligence

arising from violation of the Child Protection Law (Mich. Comp. Laws § 722.628) and the CAS and DSS service manuals. Section 1983 was not mentioned. (Appeal App. 54, at 7-8.)

The trial court then ruled that there was no statutory or contractual duty owed the Petitioners and that the only cause of action remaining was ordinary negligence. Petitioners contested only the nature and extent of the negligence duty, but again mentioned nothing about § 1983. (Appeal App. 54.)

The court next focused on which witnesses would be testifying concerning the issue of the sole duty the court saw as remaining to the Petitioners, *i.e.*, ordinary care under common law negligence. Respondents' counsel sought a recess to consider the court's request:

> MR. KEATING:
>
> [M]ay I briefly have time to think about it? *The complaint does not allege ordinary care duties arising from common law. It alleges only a breach of statute.*
>
> THE COURT:
>
> I don't have the complaint with me anymore. I have seen it in its third incarnation.

(Appeal App. 54, at 20-22.) (emphasis added).

After considerable discussion on the record, the court became increasingly convinced that in addition to the common law negligence claim, Petitioners might be attempting to state a claim in professional negligence. Michigan court rules relating to professional negligence were then addressed:

THE COURT:

> [C]ounsels, why isn't that a claim filed under 3.001, professional negligence. Nobody's asked for 3.001. So I'm fascinated. If, in fact, this is a duty imposed upon a professional based upon the standard of care, and a pleading of that, by the way, which we never had.

(Appeal App. 54, at 23-26.)

After lengthy colloquy, the court concluded no common law negligence duty could be gleaned from the Complaint, and that professional negligence was not alleged. The court adjourned the proceedings indicating that an order of dismissal would likely follow. Section 1983 was not mentioned. (Appeal App. 54, at 26.)

By written order entered April 29, 1992, the trial court ordered summary disposition. The court ruled that: (1) the Petitioners had not presented a statute upon which a negligence claim could be predicated; (2) the Petitioners did not plead or give notice of a claim of professional negligence; (3) the Petitioners had no standing to enforce a contractual claim; and (4) an amendment to the Complaint at this time would severely prejudice the defendants. Section 1983 was never mentioned.

D. Proceedings Before the Michigan Court of Appeals

The Petitioners appealed the April 24, 1992 Order Granting Summary Disposition to the Michigan Court of Appeals claiming various procedural infirmities generally relating to their claim that negligence and/or malpractice had been alleged throughout the proceedings. On a substantive level, Petitioners urged only that summary disposition was improper because there was a state

statute upon which the Respondents were arguably liable and because the Petitioners had stated a valid professional malpractice claim.

While a cross-appeal filed by Respondents urged that Respondents were entitled to absolute quasi-judicial immunity as a defense to any common law claim, and cited some federal cases as persuasive authority, (Add. B), Petitioners' brief on appeal cited no federal cases under 42 U.S.C. § 1983. In fact, Petitioners' brief did not make reference to any federal authority at all. (Add. A, at ii.)

E. The Michigan Court of Appeals Decision

1. The Initial Decision

On January 12, 1996, the Michigan Court of Appeals held that under state law, Respondents were entitled to absolute quasi-judicial immunity in defending Petitioners' common law claim. Accordingly, the court did not reach the only issues raised in Petitioners' appeal which concerned whether malpractice or statutory negligence claims had been properly raised below. *Martin v. Children's Aid Soc'y*, 215 Mich. App. 88, 95, n.3, 544 N.W. 2d 651, 654, n.3 (1996). The majority, as well as the dissent, took note of the circumstance that Petitioners had not alleged a cause of action against Respondents under 42 U.S.C. § 1983. *Martin*, 215 Mich. App. at 96, n.5, 544 N.W. 2d at 655, n.5

2. The Rehearing

On February 2, 1996, Petitioners filed a Motion for Rehearing in the Michigan Court of Appeals, contending a 42 U.S.C. § 1983 claim had been asserted against Respondents all along and that federal law mandated that social workers are not entitled to absolute immunity.

Respondents urged that § 1983 was never alleged against any CAS Defendants, and that to the extent any such action was ever pled, it was waived in the course of the litigation. On March 29, 1996, the court of appeals granted rehearing, and the majority opinion was revised as follows: Footnote one was revised to read:

> The DSS defendants may also be protected by judicial immunity as discussed in part II of this opinion. However, because we conclude in this part that the DSS defendants were protected from liability for other reasons, it is unnecessary to consider whether they were also protected by judicial immunity.

Footnote four was revised to make the following finding:

> We find the appellate court precedents cited hereafter to be compelling notwithstanding concerns raised by Justice Thomas regarding social worker immunity in his dissenting opinion in *Hoffman v Harris*, 511 US __; 114 S Ct 1631; 128 L Ed 2d 354, 355-356 (1994) (Thomas, J., dissenting). We do not believe that the *Hoffman* dissent provides sufficient authority to conclude that the federal precedents we rely upon, all of which involved § 1983 claims, were wrongly decided. Further, Justice Thomas' concerns only apply to immunity afforded to social worker against § 1983 claims. *In the instant case, we conclude that plaintiffs did not allege § 1983 claims against the CAS defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following the dismissal of the DSS defendants.*

(Michigan Court of Appeals March 29, 1996 Order on Rehearing, App. 1.) (emphasis added).

F. Proceedings Before the Michigan Supreme Court

The Petitioners subsequently sought leave to appeal the January 12, 1996 Michigan Court of Appeals opinion to the Michigan Supreme Court. In their application, the Petitioners challenged social worker immunity in a 42 U.S.C. § 1983 action and in a state law tort claim, but did not otherwise address the lengthy record described, *supra*. The Petitioners neither challenged nor appealed from the March 29, 1996 Order.

On April 1, 1997, the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal stating:

> We note that the Court of Appeals majority described its decision as being limited to the facts of this case, "in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy."

Martin v. Zak, 562 N.W. 2d 782 (1997). Motion for reconsideration was denied on June 30, 1997. *Martin v. Zak*, 562 N.W. 2d 244 (1997).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Petitioners contend that they brought a 42 U.S.C. § 1983 claim against the Respondents but that the Michigan Court of Appeals determined "without elaboration" that a § 1983 claim was not alleged. Both assertions are entirely false and based upon a plain misreading of the record below.

It can not be seriously claimed that a § 1983 action was raised or pursued against any CAS Defendant. Respondents fully briefed this position, and it was adopted by the Michigan Court of Appeals on March 29, 1996. In their Petition, the Petitioners do not even mention the March 29, 1996 Order and virtually ignore the fact that a § 1983 claim was never raised against the CAS Defendants, just as they ignored the issue in the courts below even as it was briefed by Respondents and addressed by the courts.

A. A Claim Under 42 U.S.C. § 1983 was Never Made

1. The Circuit Court

a. The Pleadings Applicable to CAS did not Contain a 42 U.S.C. § 1983 Claim

Only one of the two cases on appeal before this Court contains a § 1983 claim at all. The 1989 Second Amended Complaint attempts to assert a civil rights claim the DSS Defendants only. This language is quoted extensively at pages six and seven of the Petition. That Complaint does not raise a § 1983 claim against CAS.[1]

---

1. Paragraph 51 of the Petitioners' Second Amended Complaint in the 1989 case expressly limits the allegations of Count III, which makes the § 1983 claim, to "Defendants GREEN, SWIEHART, FENISON and HART, individually." Paragraph 6 of the Second Amended Complaint defines these individuals as the "DSS Defendants." The conspiracy language in paragraph 51 merely defines the actions of the DSS Defendants and does not state a cause of action against the parties who are not named in capital letters. The fact that two of the non-DSS parties named (Children's Aid Society and Dr. Schornstein) are not even Defendants in the 1989 case shows that the names supplied are intended merely to be descriptive of the alleged conspiracy by the DSS Defendants. The Second Amended Complaint in the 1988 case. (Appeal App. 18), (Cont'd)

b. Waiver and Abandonment

The Michigan Court of Appeals held on March 29, 1996 that to the extent that the Petitioners may actually have pled a valid 42 U.S.C. § 1983 cause of action against one or more of the Respondents, such a claim was waived and abandoned during the subsequent course of the litigation. (App. A, n.4.) That ruling is as totally supported by the record as it is ignored by the Petitioners.

Particularly telling is the conduct of Petitioners on March 24, 1992 — just before the scheduled trial — when the Petitioners were required by the Court to present the legal basis for their claims under penalty of dismissal. No § 1983 claim is made by the Petitioners in their portion of the Joint Pre-Trial Statement, filed on or about March 24, 1992. No jury instruction relating to a § 1983 claim was proposed. In their argument before the court of appeals that their complaints stated a claim upon which relief could be granted, the Petitioners stood by their March 24, 1992 assertions that their pleadings alleged only a state statutory violation and social worker malpractice. (*See* Plaintiffs-Appellants' Brief on Appeal, Add. A, at 22-23.)

The issue of the nature of the legal basis of the duty which the Petitioners claimed the Defendants owed them was a subject of constant litigation in this case. *See* discussion of civil proceedings, *supra*. Each of the amendments to all of the complaints in this case were the result of either a concession by the Petitioners' attorney, or a ruling by the trial court, that the complaint in force failed to properly or clearly allege the duty

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(Cont'd)

which is the operative pleading relating to the Defendants CAS, Stoval, and Clayton, contains no § 1983 claim, a particularly significant fact since, according to Petitioners, Defendant Clayton always was the person "who we focus our attack upon if you will." (Appeal App. 49, at 14.)

claimed by the Petitioners. Still, the theories claimed by the Petitioners were constantly changing. For example, by February, 1992, the chimerical duty had evolved into unspecified contractual duties arising from "updated service plans" and a negligence action arising from breach of duties required by an unspecified statute. (Appeal App. 49, at 14-16.) *See* discussion, *supra* at p.9.

As discussed previously, on February 21, 1992, the trial court and the parties agreed that the issue of the duties claimed by the Petitioners would be finally resolved at the pre-trial in the context of the proposed jury instructions. (Appeal App. 49, at 14-16, 23.)

Subsequently, at the March 24, 1992 pretrial hearing, the Petitioners stipulated that their only cause of action was in ordinary negligence. The Petitioners also conceded that the duties, whose alleged breach gave rise to the negligence action, were created by the Michigan Child Protection Law and the CAS and DSS manuals. Section 1983 was not mentioned.

This stipulation and concession was made to the trial court on the record, in unequivocal terms:

> THE COURT:
>
> The next issue I believe that comes to me has to do with what are the Jury instructions that would be given to the trier of fact before the commencement of proofs. It is agreed, I believe by the parties, that this is a case which is being posed as a case of ordinary negligence; is that correct?
>
> MR. SCHRIER:
>
> Yes.

THE COURT:

Plaintiff asserts that this duty of ordinary care arises in part from statutes; is that correct, sir?

MR. SCHRIER:

Yes, it is.

THE COURT:

And would you speak to those statutes upon which you believe your negligence claim is based?

MR. SCHREIR:

I'm speaking to a statute that requires by its express terms the department of social services —

THE COURT:

The statute number for the record.

MR. SCHRIER:

As I was saying, the Plaintiffs rely at least in part or every part upon the child protection law, in particular the plaintiffs rely upon M.C.L. 722.628. That statute by its terms appears to pertain specifically to the department. It's our understanding that the department would refer to the Department of Social Services. . . .

It's not just that, the statute that the plaintiffs rely upon, but also the very terms of the Children's Aid Society placement manual and the Michigan Department of

> Social Services manual that the plaintiffs rely upon for finding that the defendants owed them a duty.

(Appeal App. 54, at 7-8.)

The above statement is consistent with the Pre-Trial Statement submitted by the parties which only requests jury instructions relating to a claim of ordinary negligence allegedly arising out of the child protection statutes and updated service plans. (Appeal App. 53, at 9-10.)

Under Michigan law, Petitioners were conclusively bound by admissions at a pre-trial hearing. *Joy Oil Co. v. Fruehauf Trailer Co.*, 319 Mich. 277, 280, 29 N.W. 2d 691, 692 (1947). A party is not only bound by his concession as to what the issues remaining for trial are, but also by the issues he has eliminated from the case. In Michigan, this waiver and elimination may occur in an informal document such as a trial brief and precludes subsequently raising the eliminated issues on appeal. *Kast v. Citizens Mut. Ins. Co.*, 125 Mich. App. 309, 312-13, 336 N.W. 2d 18, 20 (1983); *Ass'n of Hebrew Teachers of Metro. Detroit v. Jewish Welfare Fed'n of Detroit*, 62 Mich. App. 54, 57-58, 233 N.W. 2d 184, 186 (1975).

Under Mich. Court Rule 2.401(C)(1)(a), the trial court and the parties may simplify the issues in the case at the pre-trial hearing. This procedure is intended to allow a judge to require a far more specific statement of the issues to be litigated than merely directing the amendment of pleadings. The pre-trial controls the subsequent course of a case. *Ministrelli Constr. Co. v. Monroe County Road Comm'n*, 153 Mich. App. 144, 149, 395 N.W. 2d 38, 40 (1986); *Banaszewski v. Colman*, 131 Mich. App. 92, 94-95, 345 N.W. 2d 647, 648-49 (1983); *Ashley v. St. Joseph Mercy Hosp. of Detroit*, 14 Mich. App. 289, 165 N.W. 2d 429 (1968). The issues were set forth in the written Pre-Trial

Statement presented to the trial judge and unequivocally stated on the record by the Petitioners' counsel. Such an agreement at pre-trial supercedes even those issues that were actually pled in the Complaint.

2. The Court of Appeals

In their Plaintiffs-Appellants' Brief on Appeal, (Add. A), Petitioners primarily contended that "[t]he Complaint Stated A Claim Upon Which Relief Can Be Granted." The brief focused on Petitioners' claim that the Second Amended Complaint contains a malpractice claim. No claim of a 42 U.S.C. § 1983 cause of action was mentioned.

In Michigan and elsewhere, the appellate tribunal generally declines to consider any issues which were not preserved for appeal by being raised prior to the court of appeals. *Long v. Pettinato*, 394 Mich. 343, 349, 230 N.W. 2d 550, 553 (1975). The issue which the Petitioners seek to raise before this Court was not only waived or abandoned in the trial court to the extent it may ever have been asserted against Respondents, but the issue was also waived in the claim of appeal process and most subsequent proceedings before the Michigan Court of Appeals. *Joplin v. University of Mich. Bd. of Regents*, 184 Mich. App. 497, 498-99, 459 N.W. 2d 70, 71 (1990).

B. Petitioners Have Not Appealed or Addressed Essential Portions of the Court of Appeals Decision on the 42 U.S.C. § 1983 Issue.

Petitioners have postured the issues in their Petition as if the Michigan Court of Appeals had denied the Petitioners' Motion for Rehearing. In fact, the March 29, 1996 Order of the Michigan Court of Appeals *granting* rehearing, (App. 1), is neither referenced, attached, nor otherwise addressed by

Petitioners. However, as previously discussed, the court of appeals granted the rehearing and made two central findings relating to the Petitioners' purported § 1983 claim. First, the court ruled that the Petitioners did not plead a § 1983 claim against Respondents. Second, the court ruled that to the extent the pleadings may be interpreted to assert such a claim, the claim was waived and abandoned by the Petitioners. This decision followed extensive briefing of the issue by Respondents, and was hardly "without elaboration" as now claimed by Petitioners.

The entire Petition presupposes that an action under § 1983 exists in this case. Petitioners treat Respondents' briefs and two specific findings by the court of appeals directly addressing this issue as if they are non-existent.

The two critical findings by the Michigan Court of Appeals on rehearing were not appealed to the Michigan Supreme Court, nor were the issues of whether a § 1983 claim was pled or subsequently waived presented in Petitioners' subsequent application to that court.

C. The Jurisdictional Requirements of 28 U.S.C. § 1257 Are Unsatisfied.

28 U.S.C. § 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed

> under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In reviewing the judgments of state courts under the jurisdictional grant of § 1257, this Court has, with very rare exception, refused to consider petitioner's claims not raised or addressed below. *Yee v. Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992); *Adams v. Robertson*, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

This is a case where Petitioners did not even attempt to appeal the March 29, 1996 Order of the Michigan Court of Appeals, which expressly held that:

> *[P]laintiffs did not allege § 1983 claims against the CAS Defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following dismissal of the DSS defendants.*

(App. 1.)

> [When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can show the contrary.

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474 (1987). The aggrieved party bears the burden of defeating this assumption. *Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981).

> We have described in different ways how a petitioner may satisfy this requirement. See Street v. New York, 394 U.S. 576, 583-85, 89 S.Ct. 1354, 1361-2, 22 L.Ed.2d 392 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time and in the manner required by the state law," Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988) (quoting Webb, supra, at 501, 101 S.Ct., at 1894), see, e.g., Exxon Corp. v. Eagerton, 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2301, n.3, 76 L.Ed.2d 497 (1983); Beck v. Washington, 369 U.S. 541, 549-54, 82 S.Ct. 955, 959-63, 8 L.Ed.2d 98 (1962), or to persuade us that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, see, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-28, 72 L.Ed.2d 824 (1982). In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed.2d 741 (1980). See generally, 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4022, pp. 322-339 (1996).

Adams, 117 S. Ct. at 1029-30.

Similar to this Court's determination in *Adams*, however the requirements are phrased in the instant case, Petitioners have failed to satisfy them. Petitioners have done nothing to demonstrate that they complied with the applicable state rules

for raising their § 1983 claim before the trial court, the Michigan Court of Appeals, or even the Michigan Supreme Court. Under such circumstances, they have totally failed to show why the failure to satisfy the numerous rules involved would not be an adequate and independent ground for the state court to disregard that claim. *See Adams*, 117 S. Ct. at 1030.

II.

REVIEW BY THIS COURT WOULD RESOLVE NO IMPORTANT QUESTION OF FEDERAL LAW.

Sup. Ct. R. 10 provides in pertinent part:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. Judicial Immunity Under Michigan Law Does Not Constitute An Important Question of Federal Law.

1. Decision Under State Law

Because Petitioners essentially pursued a negligence action through the trial courts, because the only issues properly raised

by the Petitioners on appeal related to whether proper negligence or malpractice claims had been brought, and because any immunity discussion in this case pertains only to state common law immunity from those actions, there is no important federal law in question in this case. Even the portion of the court of appeals opinion most supportive of Petitioners' position specifically disavows the possibility that any federal issue might exist in this case. *See Martin v. Children's Soc'y*, 215 Mich. App. 88, 112, n.12, 544 N.W. 2d 662-63, n.12 (1996) (White, J., concurring in part and dissenting in part) (discussing the distinction).

It is undisputed that numerous citations to federal civil rights cases are found within the record of the circuit court, briefs submitted to the Michigan Court of Appeals, decision of the court of appeals, and briefs submitted to the Michigan Supreme Court.

Respondents have cited federal civil rights cases throughout this litigation, but *always as only* ***persuasive*** *authority on the issue of absolute quasi-judicial immunity for social workers in the context of a state negligence claim.* Recognizing that federal civil rights cases on the immunity issue were not binding on Michigan courts in this litigation, Respondents have indicated that the federal law in accord with Michigan law could be used by the Michigan courts as a guidance for application of state law. (*See* Respondents' Cross- Appellants' Brief to the Michigan Court of Appeals, Add. B, at 15-16, 19-20.)

Consistent with this, Respondents have contested cases such as *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), on the basis that the case only provided persuasive authority, while the Michigan cases directly on point cited by Respondents provided mandatory authority. (*See* Defendants' Reply Brief to Plaintiffs' Response to Defendants' Motion in

Limine, Appeal App. 48, at 3-4; Cross-Appellants' Brief, Add. B, at 24.)

The Michigan Court of Appeals applied the same approach, citing federal cases only as persuasive authority where they found "no Michigan precedent regarding this question." *Martin v. Children's Aid Soc'y*, 215 Mich. App. 88, 97, 544 N.W. 2d 651, 655 (1996). In fact, the footnote to the federal civil rights cases cited by the court of appeals states that these cases are persuasive *despite* being civil rights cases. *Martin*, 215 Mich. App. at 96, n.5, 544 N.W. 2d at 655, n.5.

The court of appeals dissenting opinion illustrates the point. The *dissent distinguished federal cases involving 42 U.S.C. § 1983 from the Petitioners' case on the ground that Petitioners' case involves state, not federal law. Id.* at 112-13, 544 N.W. 2d at 662-63 (White, J., concurring in part and dissenting in part). Obviously, the dissent did not realize that Petitioners would soon claim their case was a § 1983 case after all.

Petitioners' arguments regarding the appropriateness of immunity for social workers is specifically confined to the context of a 42 U.S.C. § 1983 claim itself. However, as should now be apparent, § 1983 was never an issue in this case. Therefore, Petitioners essentially seek this Court's review of a state court's decision made under state law.

2. This Case was Decided on Specific Facts Unrelated to the Blanket Immunity Doctrine

The state law immunity issues and the rulings of the Michigan state courts in relation to those issues were carefully related to the specific facts of this case. The specific facts of this case are particularly unsuitable to test the Petitioners' question presented:

> Whether foster care workers employed by private corporation under contract with the State of Michigan to provide services under state law to parents and children and foster care to children alleged in a Probate Court proceeding to have been abused, are absolutely immune from a suit for damages under 42 U.S.C. § 1983 with respect to *all their activities.*

(Brief for Petitioners, at i.) (emphasis added).

Petitioners seek to challenge the line of authority exemplified by *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) and *Coverdell v. Department of Social Servs.*, 834 F.2d 758 (9th Cir. 1987) to the extent such § 1983 cases provide Respondents with what Petitioners term as "an all-inclusive blanket absolute immunity" for social workers. Petitioners even suggest the Michigan Court of Appeals found such "blanket absolute immunity" to exist in this case. The Michigan Court of Appeals decision itself expressly refutes this contention. The majority specifically stated:

> [W]hile *Kurzawa* has been described as granting "blanket absolute immunity" to social workers, as the dissent notes, *our decision is not properly so described. It is limited to the facts of this case, in which the close oversight of the social workers placement recommendations by the Probate Court is especially noteworthy.*

Martin, 215 Mich. App. 88, 96, 544 N.W. 2d 651, 655 (1996) (emphasis added).

Hence, the court of appeals majority expressly indicated that its decision to grant immunity arose out of Respondents' status "in operating as an arm of the probate court to protect

abused children." *Martin*, 215 Mich. App. at 97-98, 544 N.W. 2d at 655-56. This reference to the highly supervised nature of Respondents' activities was made just as the court of appeals limited its holding, rejecting the very proposition Petitioners now wish to have reviewed.

In effect, the state court's determination reflects that "this case has a central, unbending reality which the court has requested to consider — *Plaintiff's alleged damages flow from the actions of the Probate Court*." (Brief in Support of Defendants' Motion for Summary Disposition, Appeal App. 42, at 5).

In the opinion denying leave to appeal from the Michigan Court of Appeals, the Michigan Supreme Court also noted:

> [T]hat the Court of Appeals majority described its decision as being limited to the facts of this case "in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy."

Martin v. Zak, 562 N.W. 2d 782 (1997).

Hence, and as reflected at every stage of the litigation below, this case could never present a proper basis for review of any federal blanket immunity doctrine. To the contrary, the fact that the Respondents did exactly what they were ordered to do by the probate court has been noted at each stage of the litigation, and consistently noted by each state appellate court even while refusing to extend Michigan's common law immunity to include blanket immunity.

3. This Court has Declined to Review the Issue Whether Social Workers are Immune from 42 U.S.C. § 1983 Liability.

Even if the many attempts delineated above by Petitioners to recast both the factual and legal underpinnings of this case as a § 1983 claim were successful, recent decisions of this Court would suggest that the hypothetical case thereby created would not be appropriate for review by this Court. As Petitioners note, similar Petitions for Certiorari have been denied in the recent past. *See, e.g., Hoffman v. Harris*, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994); *Doe v. Bennett*, 510 U.S. 1164, 114 S. Ct. 1189, 127 L. Ed. 2d 539 (1994).

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE COURT OF APPEALS FOR THE STATE OF MICHIGAN DATED MARCH 29, 1996

Court of Appeals, State of Michigan

Michael Martin

v

Warren Swiehart

Docket # 140360, 152486, 152489

L.C. # 88-805900, 89-905474-CZ, 89-905475

Helene N. White
Presiding Judge

Richard A. Bandstra
Walter P. Cynar
Judges

ORDER

The Court orders that the motion for rehearing is granted and that footnotes 1 and 4 of the majority opinion issued January 12, 1996 are revised to read as follows:

1. The DSS defendants may also be protected by judicial immunity as discussed in part II of this opinion. However, because we conclude in this part that the DSS defendants were protected from liability for other reasons, it is unnecessary to consider whether they were also protected by judicial immunity.

Appendix A

4. We find the appellate court precedents cited hereafter to be compelling notwithstanding concerns raised by Justice Thomas regarding social worker immunity in his dissenting opinion in *Hoffman v. Harris*, 511 US __; 114 S Ct 1631; 128 L Ed 2d 354, 355-356 (1994) (Thomas, J., dissenting). We do not believe that the *Hoffman* dissent provides sufficient authority to conclude that the federal precedents we rely upon, all of which involved § 1983 claims, were wrongly decided. Further, Justice Thomas' concerns only apply to immunity afforded to social workers against § 1983 claims. In the instant case, we conclude that plaintiffs did not allege § 1983 claims against the CAS defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following the dismissal of the DSS defendants.

A true copy entered and certified by Ella Williams, Chief Clerk on

MAR 29 1996
Date

s/ Ella Williams
Chief Clerk

[seal]
STATE OF MICHIGAN
COURT OF APPEALS